TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 1515

JOHN EVANS CORNELL, APPELLANT,

vs.

HETTY R. F. GREEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 17, 1906.

(16,141.)

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163 U.S. 75

TRANSCRIPT OF RECORD.

163-75

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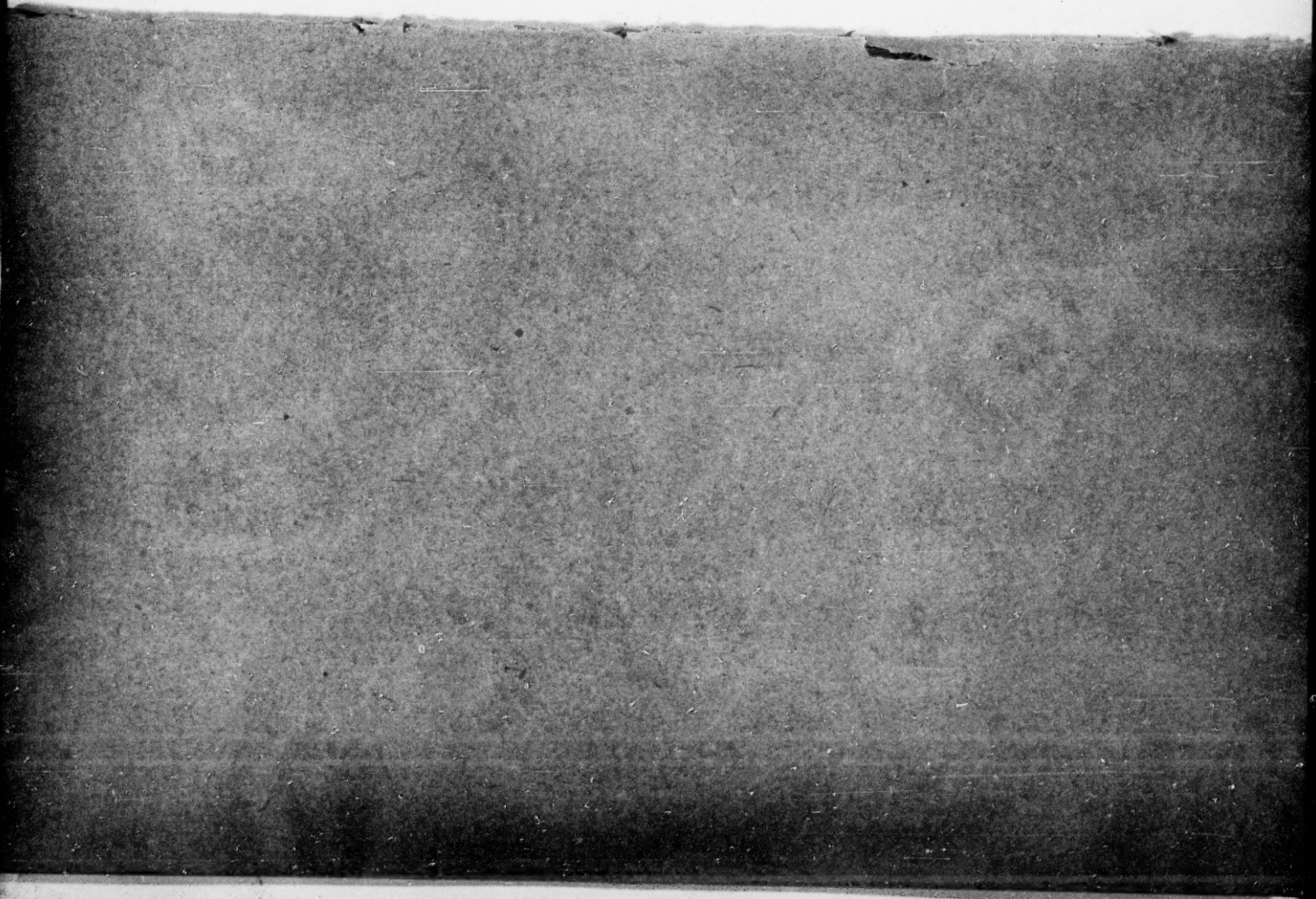

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INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Transcript from State court	3	2
Bill of complaint	3	2
Summons and return	16	8
Petition for removal	18	10
Bond for removal	20	11
Order granting leave to file petition for removal	21	12
Clerk's certificate	22	12
Chief Justice's certificate	22	12
Motion to remand	24	13
Stipulation to place motion on calendar	25	13
Order taking motion to remand under advisement	26	14
Appearance of Hetty H. R. Green	27	14
Demurrer of Hetty H. R. Green to bill	28	15
Order taking demurrer under advisement	31	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1895.

	Original.	Print.
Opinion of Judge Blodgett	32	16
Final decree	41	21
Petition for appeal	42	21
Assignment of errors	43	22
Order allowing appeal	45	23
Appeal bond	46	23
Exhibit to original case—Record in case of Hetty H. R. Green *vs.* Sarah H. Gage *et al*	48	24
Bill of complaint	48	24
Exhibit A—Principal and interest notes	71	36
B—Deed, Geo. W. Gage *et ux.* to B. E. Gallup, May 7, 1873	77	39
C—Deed, Geo. W. Gage *et ux.* to Julius White, July 22, 1871	89	46
D—Bond, Geo. W. Gage to Travelers' Ins. Co., July 22, 1871, &c.	99	51
Subpœna	103	53
Marshal's return	104	53
Answer of Heath and Milligan	107	55
Alias subpœna	111	57
Marshal's return	112	58
Affidavit of non-residence	113	58
Order on absent defendant John A. Rice	115	59
Alias subpœna	116	59
Marshal's return	117	60
Answer of John N. Jewett *et al*	119	61
Answer of the Tobey Furniture Co	121	62
Replication to answer of Heath & Milligan	126	64
Proof of service of order on John A. Rice	127	65
Appearance for First National Bank of Sioux City and Wm. Coffin	129	66
Appearance for Chas. A. Mather	130	66
Appearance for Mechanics' National bank	131	67
Appearance for Gallup, Peabody, and Paddock	132	67
Appearance of G. F. Morcom	133	67
Answer of Geo. W. Gage, Jr., and David A. Gage	134	68
Answer of Charles Tobey	135	68
Order of dismissal as to Bremner and Weldon	139	70
Order granting leave to amend bill by making Charles Tobey party defendant, &c	139	71
Order appointing E. H. Beebe guardian *ad litem*	139	71
Interlocutory decree, April 5, 1876	140	71
Master's report	143-1	73
Order on master's report	144	75
Order granting the Powell Roofing Co. to become party, &c	145	76
Petition of the Powell Roofing Co	146	76
Order taking exceptions of Heath and Milligan to master's report under advisement	150	78
Order overruling exceptions of Heath and Milligan to master's report	151	78
Order setting aside order allowing the Powell Roofing Co. to intervene	151	78

	Original.	Print.
Decree for sale, &c., July 31, 1876	152	79
Master's report of sale	159½	82
Exhibit A—Account and notice	172	89
Order on report of sale	176	91
Decree confirming sale, &c., February 2, 1877	177	92
Clerk's certificate	181	93
Citation and acceptance of service	182	94

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, northern division, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Monday, the fourteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the one hundred and fifteenth year.

S. W. BURNHAM, *Clerk.*

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN, JULIUS WHITE, Trustee; Benjamin E. Gallup, Trustee; Laura E. Young, C. C. Peterson, Joseph Dow, John Katzke. } 21630. In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the third day of May, 1890, came the defendants, by their solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their bond for costs and a transcript of record from the circuit court of Cook county, Illinois, in said entitled cause; which said bond and record are in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

Circuit Court, April Term, A. D. 1890.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

We enter ourselves as security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the defendant Hetty H. R. Green of any costs ordered or adjudged to be paid by her we hereby agree and stipulate that execution may issue against our property for any costs taxed against her.

Dated this third day of May, A. D. 1890.

HOYNE, FOLLANSBEE & O'CONNOR,
88 *La Salle St.*

(Endorsed:) Filed May 3, A. D. 1890. Wm. H. Bradley, clerk.

1—160

3 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County — Cook, }

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 17th day) of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Present: Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, State of Illinois; J. M. Longnecker, State's attorney; Canute R. Matson, sheriff.

Attest: HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 4th day of April, A. D. 1890, there was filed in said court a certain bill, and there issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which said bill and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

Bill.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

4 To the judges of the circuit court of Cook county, Illinois, in chancery sitting:

Your orator, John Evans Cornell, represents unto your honors that he is a resident of the city of Chicago, in the county and State aforesaid; that he brings this bill against Hetty H. R. Green, of the city and State of New York; Julius White, trustee; Benjamin E. Gallup, trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, of Cook county, State of Illinois.

Your orator represents that on July 22nd, 1871, one George W. Gage was seized of and was the owner in fee-simple of the following-described property, to wit:

Lot five (5), in block thirteen (13), fractional section fifteen (15), addition to Chicago;

Also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter (¼) of section eleven (11), township thirty-eight (38) north, range fourteen (14);

Also the south half (½) of section 13, township thirty-eight (38) north, range thirteen (13); also the south fifty (50) acres of the east half (½) of the northeast quarter (¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the east half (½) of the northeast quarter (¼) of section twenty-four (24), township thirty-eight (38) north, range thirteen (13)—

All of said property being situate east of the third (3rd) principal meridian, in the county of Cook and State of Illinois.

That said Gage, being said owner as aforesaid, to secure the payment of fifty thousand dollars ($50,000), with interest at the rate of nine (9%) per centum per annum, executed his bond, in the penal sum of sixty thousand dollars ($60,000) to the Travellers' Insurance Company of Connecticut; and said Gage, his wife joining with him, executed and delivered to Julius White, trustee, a trust deed, dated July 22nd, 1871, in and by which said trust deed said Gage conveyed to said White, as trustee, to secure the payment of said bonds, the following-described property, to wit:

The south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13); also the south fifty (50) acres of the east half (½) of the northeast ¼ of section thirteen (13), township thirty-eight (38) north, range thirteen (13);

Also the east half (½) of the northeast quarter (¼) of section twenty-four (24), township thirty-eight (38) north, range thirteen (13)—

All east of the third (3rd) principal meridian, in Cook county, in the State of Illinois.

Your orator further represents that George W. Gage, David A. Gage, and John A. Rice, on May 7th, 1873, executed and delivered to said Hettie H. R. Green their note in the sum of one hundred thousand dollars ($100,000), with interest at the rate of ten (10%) per centum per annum, payable half yearly, on the 7th days of May and of November in each year, at the office of John J. Cisco & Son, in the city of New York; also six (6) interest coupon notes for the sum of five thousand dollars ($5,000) each; and to secure the payment of said notes the said George W. Gage and Sarah H. Gage, his wife, joining with him, executed and delivered to Benjamin E. Gallup, trustee, and Francis B. Peabody, successor in trust, a trust deed dated May 7th, 1873, and filed for record May 17th, 1873, in the recorder's office in Cook county. In and by said trust deed said Gage conveyed to said Gallup, said trustee, to secure said note of one hundred thousand dollars ($100,000) and interest, the following-described property, to wit:

Lot five (5), in block thirteen (13), in fractional section fifteen (15), addition to Chicago;

Also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter (¼) of section thirteen (13), township thirty-eight (38) north, range fourteen (14);

Also the south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13);

Also the south fifty (50) acres of the east half (½) of the northeast

quarter (¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13)—

All east of the third (3rd) principal meridian, in the county of Cook and State of Illinois.

7 Your orator would further represent that he is unfamiliar with the exact terms and conditions of both said trust deeds and the notes and bond- secured thereby, but for greater certainty and particularity as to the terms, conditions, and agreements in said trust deeds, notes, and bonds contained would refer to the files and exhibits in case of Green *vs.* Gage, in the United States circuit court for the northern district of Illinois, and number 13072, and hereinafter more particularly mentioned, and would ask to have said files and exhibits made a part of this bill.

Your orator further represents that said George W. Gage and Sarah H. Gage, his wife, by warranty deed dated December 18th, 1874, and recorded in the recorder's office of Cook county December 19th, 1874, conveyed to one William F. Tucker all the property hereinbefore described as being conveyed by the two (2) trust deeds heretofore mentioned, to wit:

The south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the south fifty (50) acres of the east half (½) of the northeast quarter (¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the east half (½) of the northeast quarter (¼) of section twenty-four (24), township thirty-eight (38) north, range thirteen (13).

Also lot five (5), in block thirteen (13), in fractional section fifteen (15), addition to Chicago.

8 Also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter (¼) of section eleven (11), township thirty-eight (38) north, range fourteen (14), and other property, all of said described property being situate east of the third (3rd) principal meridian, in the county of Cook and State of Illinois, by which said deed the said Tucker became the absolute owner in fee-simple of all of said property.

Your orator further represents that he is informed and believes, and so charges the fact to be, that said George W. Gage, after executing and delivering the said deed to said Tucker, departed this life on or about the 24th day of September, A. D. 1875.

Your orator further represents that the said William F. Tucker, heretofore mentioned as the grantee in said deed from George W. Gage and wife, departed this life on or about the 13th day of September, A. D. 1887, intestate, leaving him surviving his widow, Phœbe Tucker; his children and only heirs-at-law, the following, to wit, William F. Tucker, Annie G. Wilder, the wife of Thomas E. Wilder, and Jennie T. Johnson.

That all of said heirs were at the time of the said death of said Tucker, their father, above the age of twenty-one (21) years; that

the said William F. Tucker and Mary L. Tucker, his wife, joining with him, by good and sufficient deed, dated the 25th day of January, A. D. 1890, and recorded in the recorder's office of Cook county on the 27th day of March, A. D. 1890, conveyed to your
9 orator all the property heretofore described as contained in and conveyed by said two (2) trust deeds executed by the said Gage; that Annie G. Wilder and Thomas E. Wilder, her husband, and Jennie T. Johnson, a widow, by good and sufficient deed, dated the 15th day of February, A. D. 1890, and recorded in the recorder's office of Cook county on the 27th day of March, A. D. 1890, conveyed to your orator all of said property heretofore described as contained in and conveyed by said two (2) trust deeds executed by the said Gage, by which said two (2) deeds your orator became the absolute owner in fee-simple of said property, subject to the two (2) said trust deeds. Said Phœbe Tucker, widow of said Wm. F. Tucker, departed this life in the year 1887, and after the death of said Wm. F. Tucker.

Your orator further represents that said Hetty H. R. Green did, on November 27th, 1875, file in the office of the clerk of the circuit court of the United States for the northern district of Illinois a certain bill for the purpose of foreclosing both of the trust deeds heretofore described; that said Hetty H. R. Green in and by the allegations in said bill contained averred that she was the owner by purchase of the bond to the Travellers' Insurance Company heretofore described and secured by the trust deed to said White; that default had been made in the payment of the interest due upon one of the notes secured by said trust deeds, and asking, among other things, that an account be taken of the amount due to said Green upon said notes, and that in default of payment the said property in said bill described and covered by the trust deeds heretofore set forth be sold, and that a decree of foreclosure be entered against certain defendants mentioned in
10 said bill. Your orator would further represent that by the various proceedings had in said cause, which will more fully appear from the orders and records of the circuit court of the United States for the northern district of Illinois and the files of said cause, reference to which is hereto had for more particularity, it appears that a decree of said honorable court was entered in said cause adjudging that there was due to said Green, the complainant therein, the sum of one hundred and eighty-six thousand five hundred and sixty-six ($186,566.00) dollars, with interest from April 13th, A. D. 1876, and that in default of payment within one hundred (100), days therefrom that the master sell said property to satisfy said debt; that afterwards all of said property was sold by said master in chancery, and that on January 2nd, 1877, the sale was confirmed by the order of said honorable court; that on February 2nd, 1877, a final decree of foreclosure was entered in said cause by said honorable court. All of said proceedings, orders, and decrees will more fully appear from the records of said United States circuit court and the files in said cause; all of which records and files are made a part of this bill and referred to for greater certainty.

Your orator further represents that Henry W. Bishop, master in chancery for the circuit court of the United States for the northern district of Illinois, in pursuance of the decree entered in said cause, made, executed, and delivered to Hetty H. R. Green a master's deed dated February 3rd, 1877, and recorded February 5th, 1877, in the recorder's office of Cook county, in and by which deed the said master conveyed to said Green all of the property heretofore
11 described as contained in the two (2) trust deeds heretofore mentioned.

Your orator would further represent that the said William F. Tucker was the owner, in his own right, of all said property and so appeared of record at the time said bill for foreclosure was filed as aforesaid and during the pendency thereof and at the time of said sale and still continued to be the owner thereof up to the time of his death; that the said William F. Tucker was not made a party defendant to said foreclosure proceedings, nor was the said William F. Tucker ever in court or subject to the orders, decrees, and judgments of said court; that said decree of foreclosure so entered as aforesaid was of no binding force or effect upon said Tucker, nor upon his heirs, nor upon your orator, the grantee of said property as aforesaid.

Your orator would further represent that he is now in the actual possession and occupation of a portion of the premises heretofore described, to wit, lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale.

Your orator further represents that said defendant, Laura E. Young, is in the actual possession and occupation of lot five (5), in block thirteen (13), in fractional section fifteen (15), addition to Chicago, but your orator is informed and believes, and so charges the fact to be, that said defendant has no other or further interest in said property than as tenant on said premises by lease from said Hetty H. R. Green, but that the terms of said lease are unknown to your orator.

12 Your orator further represents that the said defendant, G. C. Peterson, is in the possession and occupation of the following-described property, to wit, the south half ($\frac{1}{2}$) of section thirteen (13), township thirty-eight (38) north, range thirteen (13); also the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section twenty-four (24), township thirty-eight (38) north, range thirteen east, of the third (3rd) principal meridian, but your orator is informed and believes, and so charges the fact to be, that said defendant has no other or further interest in said property than as tenant under a lease from said Hetty H. R. Green, but that the terms of said lease are unknown to your orator.

Your orator further represents that the said defendant, Joseph Dow, is in the possession and occupation of the following-described property, to wit, the south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast ($\frac{1}{4}$) of section thirteen (13), township thirty-eight (38) north, range thirteen (13) east, of the third (3rd) principal meridian, but your orator is informed and believes, and so charges the fact to

be, that said defendant has no other or further interest in said property than as tenant under a lease from said Hetty H. R. Green, but that the terms of said lease are unknown to your orator.

Your orator further represents that one John Katzke, one of the defendants herein, is an occupant of a portion of the south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13) east, of the third (3rd) principal meridian, but your orator is informed and believes, and so charges the fact to be, that said defendant has no other or further interest in said property than as tenant of the defendant G. C. Peterson, but that the terms of said lease are unknown to your orator.

13

Your orator further represent- unto your honor that large amounts of money have been received by said defendant, Hetty H. R. Green, as rents and profits arising from said premises, all of which your orator is in equity entitled to receive.

Your orator further represents that he is willing and hereby offers to pay and tenders any amount of money which in equity and good conscience this honorable court shall decree to be due and owing to said Hetty H. R. Green upon a redemption of said premises from the trust deeds heretofore described.

Your orator further represents that the said defendant, Benjamin E. Gallup, was the trustee in the trust deed mentioned as given by George W. Gage and wife to secure the said note to said Green as aforesaid; that said Gallup has no other or further interest in said premises than as the trustee in said trust deed mentioned.

Your orator further represents that said defendant, Julius White, was the trustee in said trust deed mentioned as given by George W. Gage and wife to secure a bond of sixty thousand dollars ($60,000) to the Travellers' Insurance Company; that said White has no other or further interest in the said premises than as the trustee in said trust deed mentioned.

Your orator further represents that said defendant Green is now a resident of the city and State of New York and has been ever since and prior to the commencement of said foreclosure suit in said United States circuit court a resident of said State of New York.

14

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, and to the end that the said Hetty H. R. Green, Laura E. Young, G. C. Peterson, Joseph Dow, John Katzke, Julius White, trustee, and Benjamin E. Gallup, trustee, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, their answer under oath being hereby waived, and especially that said defendant Green may be compelled to fully and particularly answer and set forth all and every moneys that may have been received by her as rents and profits for the use of said premises heretofore described; that said Green may fully answer and set forth what yearly rent or rents that portion of said premises of which said Green has had possession have or might have been let since she has been in possession thereof, and that an account may be taken under the direction of this court of what is now due and

owing to the defendant Green for the principal sum and interest aforesaid, and that an account may be taken of the rents and profits of said premises received by said defendant Green or her agents or any other person on her behalf, or which, without her wilful neglect or default, might have been received by her since she entered into possession of said premises, and that upon the payment by your orator of what, if anything, shall be found remaining due to said defendant Green in respect of the said principal sum and interest, which your orator hereby offers to pay, the said defendants may be decreed to surrender and deliver up the possession of said mortgaged premises to your orator, and that the defendants Benjamin E. Gallup, trustee as aforesaid, and
15 Julius White, trustee as aforesaid, may be compelled to release said trust deeds upon the records of said county, and that upon default thereof that the master may by the order of this court release said trust deeds; that the decree heretofore entered in the United States circuit court for the northern district of Illinois in the suit of said Green to foreclose said trust deeds herein described may be decreed a cloud upon your orator's title to the premises herein described and set aside as null and void as to your orator's interest in said premises, and that the deed heretofore described as executed by the master in chancery in this court to said defendant Green may be declared and decreed null and void and of no force and effect as against the title of your orator in the premises herein described, and that your orator may have such other and further relief as equity may require and to your honor shall seem meet.

May it please your honor to grant the writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that he summon the said defendants, Hetty H. R. Green, Benjamin E. Gallup, Julius White, Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, to appear before said court on the first day of the next term thereof, to be held at the court-house, in Chicago, in the county of Cook aforesaid, then and there to answer this bill, &c.

JOHN E. CORNELL,
Complainant.

F. B. DYCHE, *Solicitor.*
ARMSTRONG, READ & DYCHE, *Of Counsel.*

16 *Summons.*

STATE OF ILLINOIS, }
County of Cook, } *ss:*

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Hetty H. R. Green, Benjamin E. Gallup, Julius White, Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, if they shall be found in your county, personally to be and appear before the circuit court of Cook

county on the first day of the term thereof, to be holden at the court-house, in Chicago, in said Cook county, on the third Monday of April, A. D. 1890, to answer unto John Evans Cornell in his certain bill of complaint filed in said court on the chancery side thereof; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of said court, and the seal thereof, at Chicago, in said county, this 4th day of April, A. D. 1890.

[SEAL.] HENRY BEST, *Clerk.*

Endorsement: P'd 1.00. P'd 5.55. M. 2.40. I hereby appoint C. L. Harper my special deputy to serve the within writ. Canute R. Matson, sheriff. Chicago, April 4th, 1890.

STATE OF ILLINOIS, } ss:
County of Cook, }

C. L. Harper, being sworn, deposes and says that he is the person appointed to serve the with- writ, and he further affirms that
17 he served the same on the within-named Hetty H. R. Green by reading to and delivering to her a true copy thereof this 4th day of April, A. D. 1890.

C. L. HARPER.

Subscribed and sworn to before me this 5th day of April, A. D. 1890.

[SEAL.] WILLIAM FRIES,
Notary Public.

Also served this writ upon the within-named defendant, Julius White, by delivering a copy thereof to him this 8th day of April, A. D. 1890.

Also served this writ upon the within-named defendant, Benj. E. Gallup, by leaving a copy thereof at his usual place of abode with Dilla L. Gallup, a member of his family over the age of ten years, and at the same time informing her of the contents thereof, this 8th day of April, A. D. 1890.

Also served this writ upon the within-named defendant, Laura E. Young, by leaving a copy thereof at her usual place of abode with Besse Corner, a member of her family over the age of ten years, and at the same time informing her of the contents thereof, this 8th day of April, A. D. 1890.

Also served this writ on the within-named defendant, G. C. Peterson, by leaving a copy thereof at his usual place of abode with Lissie Peterson, a member of his family over the age of ten years, and at the same time informing her of the contents thereof, this 10th day of April, A. D. 1890.

Also served this writ upon the within-named defendant-, Joseph Dow and John Katzke, by delivering a copy thereof to each
18 of them this 10th day of April, A. D. 1890.

CANUTE R. MATSON, *Sheriff,*
By HENRY J. BEER, *Deputy.*

And afterwards, to wit, on the 21st day of April, A. D. 1890, there was filed in said cause a certain petition for removal of said cause to the United States circuit court for the northern district of Illinois; which said petition is in the words and figures following, to wit:

Petition.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

JOHN EVANS CORNELL, Complainant,
vs.
HETTY H. R. GREEN; JULIUS WHITE, Trustee; BENJAMIN E. Gallup, Trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, Defendants.

Petition for removal to the circuit court of the United States for the northern district of Illinois.

To the honorable the judges of the circuit court of Cook county, Illinois, in chancery sitting:

Your petitioner, Hetty H. R. Green, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

19 Your petitioner further shows that the complainant in the above-entitled cause was at the time of the commencement of this suit and still is a resident of the city of Chicago, in the county and State aforesaid, and a citizen of the State of Illinois, and that your petitioner was and still is a resident and citizen of the State of Vermont.

Your petitioner further states that in the said suit above mentioned there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between your petitioner and the said complainant, John Evans Cornell.

And your petitioner offers herewith a bond, with a good and sufficient surety, for her entering in said circuit court of the United States for the northern district of Illinois, on the first day of its next session, a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court of the United States for the northern district of Illinois if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioner, therefore, prays this honorable court to proceed no further in said suit except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States for the northern district of Illinois.

And she will ever pray, etc.

HETTY H. R. GREEN.

20 STATE OF ILLINOIS, } ss:
County of Cook, }

Hetty H. R. Green, being duly sworn, upon oath says that she is one of the defendants in the above-entitled cause; that she has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true.

HETTY H. R. GREEN.

Subscribed and sworn to before me this 18th day of April, A. D. 1890.

[SEAL.] W. H. ROSE,
Notary Public.

HOYNE, FOLLANSBEE & O'CONNOR,
Sol'rs for said Petitioner.

Bond.

Know all men by these presents that I, Hetty H. R. Green, as principal, and Peyton R. Chandler, as surety, are held and firmly bound unto John Evans Cornell in the penal sum of five hundred dollars; the payment whereof, well and truly to be made, unto the said John Evans Cornell, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon this condition: The said Hetty H. R. Green having petitioned the circuit court of Cook county, in the State of Illinois, for the removal of a certain cause therein pending, wherein the said John Evans Cornell is complainant and the said Hetty H. R. Green, Julius White, trustee; Benjamin E. Gallup, trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke are
21 defendants, to the circuit court of the United States for the northern district of Illinois:

Now, if the said Hetty H. R. Green, the petitioner, shall enter in said circuit court of the United States for the northern district of Illinois, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that — suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 18th day of April, A. D. 1890.

HETTY H. R. GREEN. [SEAL.]
PEYTON R. CHANDLER. [SEAL.]

And thereupon, on the same day, to wit, the 21st day of April, A. D. 1890, the following, among other, proceedings were had and entered of record in said court, to wit:

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN. } 80450, 5256. Bill.

On motion, it is ordered that leave —, and it hereby is, granted Hetty H. R. Green to file her petition for the removal of this cause into the United States circuit court for the northern district of Illinois.

22 UNITED STATES OF AMERICA, }
State of Illinois, Cook County, } *ss:*

I, Henry Best, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the chancery side thereof, between John Evans Cornell, complainant, and Hetty H. R. Green *et al.*, defendants.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Chicago, in said county, this 28th day of April, A. D. 1890.

HENRY BEST, *Clerk.*

STATE OF ILLINOIS, }
County of Cook, } *ss:*

I, M. F. Tuley, chief justice of the circuit court of Cook county, in the State of Illinois, hereby certify that Henry Best, who signed the above certificate, was at the time of signing the same and is now clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record, having a clerk and seal; that said attestation is in due form and by the proper officer according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal, at Chicago, in said county of Cook, this 28th day of April, A. D. 1890.

M. F. TULEY, [SEAL.]
Chief Justice of the Circuit Court of Cook County.

(Endorsed:) Filed May 3, 1890. Wm. H. Bradley, clerk.

23 On the same day, to wit, on the third day of May, 1890, came the complainant, by his solicitor, and filed in said clerk's office his motion to remand, and also a stipulation in said entitled cause; which said motion and stipulation are in the words and figures following, to wit:

24 *Motion and Stipulation.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN E. CORNELL }
vs.
HETTY H. R. GREEN *et al.* }

And now comes John E. Cornell, the complainant in the bill of complaint filed in the above cause, and moves said court to remand said cause to the circuit court of Cook county on the following grounds:

First. That the said bond and petition for removal are insufficient and informal and not as by law required.

Second. That said cause was improperly and without lawful authority removed to this court.

Third. That this court has no jurisdiction of said cause, and bases his said motion upon the petition and bond filed herein for the removal of said cause from said circuit court of Cook county to this court, and also upon the bill filed herein and the records in said cause.

Dated Chicago, Illinois, May 2nd, A. D. 1890.

F. B. DYCHE,
Sol'r for Comp't, John E. Cornell.

25 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN E. CORNELL }
vs.
HETTY H. R. GREEN *et al.* }

It is hereby stipulated and agreed between the parties hereto that the clerk of said court shall place said cause, being a motion to remand, upon the contested calendar before Judge Blodgett for Monday, the 5th day of May, A. D. 1890.

F. B. DYCHE, *Sol'r for Compl't.*
HOYNE, FOLLANSBEE & O'CONNOR,
Sol'rs for Def't Green.

Dated Chicago, Illinois, May 2nd, A. D. 1890.

(Endorsed:) Filed May 3, 1890. Wm. H. Bradley, clerk.

26 Afterward, to wit, on the fifth day of May, in the adjourned May term of said court, 1890, in the record of the proceed-

ings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

Now come the parties, by their solicitors, and the complainant's motion to remand this cause comes on to be heard, and, after hearing the arguments of counsel, the court takes the same under advisement.

On the same day, to wit, on the fifth day of May, 1890, came Hetty H. R. Green, by her solicitors, and filed in said clerk's office her appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

27 *Appearance of Hetty H. R. Green.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

We hereby enter the appearance of Hetty H. R. Green, one of the defendants in the above-entitled cause.

HOYNE, FOLLANSBEE & O'CONNOR,
Sol'rs and of Counsel for Defendant Hetty H. R. Green.

May 5, 1890.

(Endorsed:) Filed May 5, 1890. Wm. H. Bradley, clerk.

Afterward, to wit, on the twenty-sixth day of May, 1890, came Hetty H. R. Green, by her solicitors, and filed in said clerk's office her demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

28 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court Thereof.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN, JULIUS WHITE, Trustee; BENJAMIN E. Gallup, Trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke.

The several demurrer of Hetty H. R. Green, one of the above-named defendants, to the bill of complaint of the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows that the complainant has not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill and to the matters and things therein contained, and prays the judgment of this honorable court whether she shall be com-
29 pelled to make any further or other answer to the said bill, and she prays to be dismissed with her reasonable costs in this behalf sustained.

JOHN P. AHRENS,
HENRY DECKER,
Solicitors for said Defendant, Hetty H. R. Green.

We do hereby certify that in our opinion the foregoing demurrer of Hetty H. R. Green, defendant to the bill of complaint of John Evans Cornell, complainant, is well founded in point of law and proper to be filed in the above cause.

JOHN P. AHRENS,
HENRY DECKER,
Solicitors for said Defendant, Hetty H. R. Green.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Cook County. }

John P. Ahrens, being duly sworn, deposes and says that he is one of the solicitors for the above-named defendant, Hetty H. R. Green, and that the said Hetty H. R. Green is a non-resident of the State of Illinois, and that it is inconvenient for this affiant to procure from her the affidavit required by the rules of this court to accom-

pany a demurrer, and therefore this affiant makes this affidavit on her behalf.

This affiant further says that he knows of his own knowledge, and therefore avers the fact to be, that the foregoing demurrer
30 of said Hetty H. R. Green to the bill of complaint of the above-named John Evans Cornell in this suit is not interposed for the purpose of delaying said suit or any proceedings therein.

JOHN P. AHRENS.

Subscribed and sworn to before me this 26th day of May, A. D. 1890.

JAMES TODD,
[SEAL.] *Notary Public.*

(Endorsed:) Filed May 26, 1890. Wm. H. Bradley, clerk.

31 Afterward, to wit, on the thirtieth day of June, in the adjourned May term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN EVANS CORNELL
vs. } In Chancery.
HETTY H. R. GREEN *et al.*

Now come the parties, by their solicitors, and the demurrer of the defendant Green comes on to be heard, and after hearing the arguments of counsel the court takes the same under advisement.

Afterward, to wit. on the fourteenth day of July, 1890, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause; which said opinion is in the words and figures following, to wit:

32 In the Circuit Court of the United States for the Northern District of Illinois.

JOHN E. CORNELL
vs.
HETTY H. R. GREEN *et al.*

JULY 14, 1890.

BLODGETT, *J.:*

The defendants have interposed a general demurrer to the bill filed in this case, which has been argued and submitted.

The bill charges in substance that in 1871 George W. Gage was the owner of divers lots and parcels of land in the city of Chicago and vicinity, upon which he made a trust deed to secure the payment of his notes to the amount of $50,000, and that in 1873 he

made another trust deed upon the same property to secure the payment of notes to the amount of $100,000, making a total incumbrance upon the property of $150,000 and accruing interest; that in December, 1874, after the making and recording of the aforementioned trust deeds, Gage made a deed in fee-simple of the same lands to William F. Tucker, which was duly recorded in the office of the recorder of Cook county.

That George W. Gage died in September, 1875, after the execution and recording of said deed to Tucker, and that Tucker died about September, 1887, leaving him surviving a widow and two children as his heirs-at-law, and that since the 25th day of
33 January, 1890, those two children and heirs of Tucker have conveyed all their right, title, and interest in the said property to the complainant.

The bill further charges that in November, 1875, the defendant Mrs. Green, having become the owner and holder of the notes secured by said two trust deeds, filed in this court a bill to foreclose the same; that such proceedings were had in said case as that a decree of foreclosure was entered finding that there was due to the complainant, Mrs. Green, the sum of $186,566, and that on the 2nd day of January, 1877, all the said lots and parcels of land were sold under said decree, and Mrs. Green became the purchaser thereof, which sale was duly confirmed and a deed made to the purchaser by the master in chancery of this court.

The bill further alleges that William F. Tucker was the owner of record of all the said lots and parcels of land at the time of the foreclosure proceedings and so remained up to the time of his death; that he was not made a party defendant to the foreclosure proceedings, nor ever in court, nor subject to the orders, decrees, or judgment of this court, and avers that the foreclosure decree is not binding on him or on his heirs or on the complainant as a grantee of his heirs. Complainant then asks that an accounting be had of the rents and profits of the property since the conveyance thereof to the defendant Mrs. Green and others, and offers to pay whatever was found to be due upon the said trust deeds after deducting rents and profits received by Mrs. Green, and prays that he be allowed to redeem said premises on the payment of whatever shall be found
34 due. The bill refers to the orders, decrees, and files in the foreclosure proceedings for more specific statements and details in regard to what was done in that suit and makes the same a part of the bill. An examination of the bill in the foreclosure case shows that the introductory clause of said bill was as follows:

"Your oratrix, Hetty H. R. Green, who is a resident of Bellows Falls, in the State of Vermont, and citizen of said last-named State, brings this her bill of complaint against Sarah H. Gage, a resident of the city of Chicago, Illinois, a citizen of the State of Illinois, and the widow of the late George W. Gage, of Chicago, deceased, and executrix of his last will and testament; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of the said George W. Gage, deceased, each of said children being now residents of the city of Chicago and

citizens of the State of Illinois, the said two last-named children, George W. Gage, Jr., and David A. Gage, being minors; William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, State of Illinois, and citizens of said last-named State and guardians of said minor children—

"The said William F. Tucker being also one of the executors of the last will and testament of said George W. Gage, deceased."

And in another part of the bill the complainant states as follows:

"Your oratrix further shows that the said George W. Gage, the maker of said notes, heretofore, to wit, on the 24th day of
35 September, 1875, at Chicago aforesaid, departed this life, leaving him surviving the said Sarah H. Gage, his widow, and the said Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., David A. Gage, his only children, the last two named being minors, and leaving a last will and testament, in and by which he appointed the said William F. Tucker, Lewis L. Coburn, and his said widow executors and executrix and devised to them, upon certain conditions therein named, all his real estate, having before that time, as appears by the records in said recorder's office, by deed executed by himself and wife, dated December 18, 1874, and recorded in said recorder's office December 19, 1874, for the consideration, as expressed in said deed, of $24,000, conveyed to said Tucker all said premises herein described, subject to said incumbrances.

"Your oratrix further shows that said above-named parties, against whom this bill of complaint is brought, have or claim to have some interest in said premises described in said trust deeds by mortgage, judgment, conveyance, or otherwise; but your oratrix states those interests, whatever they are, are subject to the rights of your oratrix under her securities before mentioned and cannot be set up against the same nor in any way interfere therewith," and the prayer for process was that the process of the court might issue "directed to the said Sarah H. Gage and the other defendants hereinbefore named," &c.

The summons was issued in the case and ran against Sarah H. Gage, widow, and the children of the said George W. Gage (naming them), William F. Tucker, Joseph K. Barry, John W. Clapp, guardian, &c., William F. Tucker, executor, &c., and the return of
36 the marshal was that he had served the writ by personally delivering a true and correct copy thereof to each of the defendants named, including the name of William F. Tucker, guardian, and William F. Tucker, executor, on the 8th day of December, 1875.

This summons was returnable on the first Monday in January, 1876. On the 5th day of April, 1876 (the first Monday of April having been on the third day of said month), default was entered in said cause, the record entry of which recited, first, service upon some of the defendants and appearances by them, and then proceeds:

"And it appearing that due and legal personal service has been

had upon all the other remaining defendants in this cause by service of subpœna in this cause upon them respectively, and that each and all the defendants in this cause are now legally before this court and subject to its jurisdiction, and that neither of said defendants have pleaded, answered, or demurred therein excepting the following-named defendants" (naming them, not including Tucker in any capacity). The order was in the following words:

"On motion of complainant's solicitor, it is ordered that each and all of said defendants who have not pleaded, answered, or demurred as aforesaid, namely," then naming the widow and children of George W. Gage, William F. Tucker, and others (naming them), "do plead, answer, or demur to the bill of complaint in this cause instanter, and said last-named defendants, having each been
37 three times called so to do, come not, but make default, and it is hereby ordered, adjudged, and decreed that as to each of said defendants last named and so making default, as aforesaid, said bill of complaint and the matters and things therein contained be taken as and for confessed."

It will be seen from these quotations from the record that while the bill in this case avers that Tucker was not made a party and not brought before the court, it does appear that he was made a party distinctly in his representative capacity as executor and guardian, and that the bill also clearly and distinctly charged that the conveyance was made to him by Gage in December, 1874, whereby he became the owner of the premises in question, subject to the trust deeds. The bill averring, therefore, a mere legal conclusion as to Tucker's not being a party, that averment is not admitted by the demurrer, unless facts and circumstances set forth are sufficient to sustain the allegation.

Gould *vs.* Evansville, etc., R. R. Co., 91 U. S., 526.

There can be no doubt that Tucker was before the court in his representative capacities, and that the bill also contained sufficient averments to put him upon answer as to his individual interest in the subject-matter of the controversy. In Brasher *v.* Van Cortland, 2 Johnson's Ch'y Rep., 242, the bill was against a committee of a lunatic, the subpœna was issued by the clerk of the court, but he omitted the addition of the plaintiffs as executors and of the defendants as a committee, believing those additions unnecessary in the process.

A default was taken against the defendants as committee and a decree entered against them as such.

38 Upon an application to set aside the default and decree upon the ground that they were not served as a committee, the court held that the defendants were too late for this objection, and that the process was sufficiently applicable to that bill.

And in Executor of Walton *v.* Herbert, 3 Green's Ch'y Rep. (N. J.), 73, the bill was filed against James Herbert, surviving executor of James Herbert, deceased. The prayer was for process against said James Herbert.

The subpœna issued against James Herbert generally, without

stating his official character or stating the character in which he was sued. On a demurrer to the bill the court said:

"It is by inspecting the bill that the defendant ascertains the nature of the charge against him. The subpœna only gives him notice that there is a bill filed against him, and if he be properly charged in the bill as executor or devisee or in any other capacity, it is not a good objection that the subpœna is issued against him generally."

Upon the principle asserted in this case, it seems quite clear to me that Tucker, having been served with process in his representative capacity, was chargeable with notice of the entire contents of the bill, so far as it affected him in his representative or his individual capacity, and that it does not lie in his mouth to say that he was not properly before the court. When Mr. Tucker was summoned into court as executor and guardian he was chargeable with notice of the entire contents and scope of the bill, both as it
39 affected his representative and his individual capacity. He certainly must be conclusively presumed to have known that a bill was pending to foreclose those two trust deeds upon the property, which he had acquired by the deed from Gage in December, 1874, and that he had himself individually acquired title to these lands by a deed from Gage subsequent to the making of those trust deeds.

I am, therefore, clear that Tucker was sufficiently made a party before the court to bind him in his individual as well as his representative capacity.

The record entry of the default also recites that all the parties defaulting, among whom were Tucker, had been duly served with process, and as there was ample time between the issue and return of the summons served on Tucker in his representative capacity and the time default was taken, at the April term, 1876, for the issue of an alias or plur-es summons and service upon Tucker individually, the court will, I think, presume that such service was obtained as is recited in the order of the court.

Robinson *v.* Fair, 128 U. S. (page 87).
Sargent *v.* State Bank of Ind., 12 How., 371.
Mulvey *v.* Gibbons, 87 Ill., 367.

It may also, I think, be urged with great force that this bill should not be sustained on the ground of the laches of the complainant. Tucker acquired his title before the foreclosure proceedings. The foreclosure proceedings were completed on the 2nd of January, 1877. Tucker lived until September, 1887, nearly ten years, and
40 there is no allegation or statement in the bill that his heirs-at-law were then laboring under any disability. This suit was not commenced until April, 1890, so that there has been a period of over thirteen years since the commencement of the foreclosure proceedings and the vesting of the absolute title to this property in the complainant, and yet no attempt is made to explain this long delay or to give any reason why the complainant or those under whom the complainant claims have not instituted proceed-

ings at an earlier day, and it has been held by the Supreme Court of the United States that laches may be availed as of a defence on demurrer.

Lansdale *v.* Smith, 106 U. S., 391.
Speidel *v.* Henrice, 120 U. S., 377.
Richards *v.* Mackall, 124 U. S., 183.

In the latter case a bill to set aside a marshal's deed nearly twelve years after the sale was held to be too late and the laches was held sufficient on demurrer.

I choose, however, to place my decision in the case upon the ground that Tucker was sufficiently before the court in the foreclosure proceedings to be bound by the decree of sale there made, and that those claiming under him cannot now complain that he was not specifically served with process in his individual capacity.

The demurrer is sustained and the bill dismissed for want of equity.

(Endorsed:) Filed July 14, 1890. Wm. H. Bradley, clerk.

41 On the same day, to wit, on the fourteenth day of July, in the July term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

Now come the defendants, by their solicitor, and the court, having considered the defendants' demurrer to the bill herein, sustains the same, and it is ordered that said bill be dismissed for want of equity at complainant's costs, and that execution issue therefor.

42 Afterward, to wit, on the seventh day of July, 1892, came the complainant, by his solicitors, and filed in said clerk's office his petition for an appeal in said entitled cause; which said petition is in the words and figures following, to wit:

Petition.

Circuit Court of the United States, Northern District of Illinois.

JOHN EVANS CORNELL, Complainant, Appellant,
vs.
HETTY H. R. GREEN, Respondent, Appellee.

The above-named complainant, John Evans Cornell, conceiving himself aggrieved by the decree entered on the 14th day of July, A. D. 1890, in the above-entitled proceeding dismissing his bill of

complaint, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 7th, 1892.

ROBERT RAE,
RICHARD S. THOMPSON,
F. B. DYCHE,
Sol'rs for Compl't and Appellant.

(Endorsed:) Filed July 7, 1892. S. W. Burnham, clerk.

43 On the same day, to wit, on the seventh day of July, 1892, came John E. Cornell, complainant, by his solicitors, and filed in said clerk's office his assignment of errors in said entitled cause: which said assignment of errors *are* in the words and figures following, to wit:

Assignment of Errors on Appeal to the Supreme Court of the United States.

And now comes the appellant, by his solicitors, and assigns the following errors:

1st. That the court erred in dismissing his bill of complaint for want of equity.

2nd. That the court erred in refusing to grant the prayer of the complainant as prayed in his bill of complaint.

3rd. That the court erred in refusing to grant so much of the prayer of said bill of complaint in which it is asked that he be decreed the right to redeem his said lands mentioned in said bill from the mortgage debt due to Hetty H. R. Green.

4th. That the court erred in holding that William F. Tucker, the grantor of the land mentioned in said bill to complainant, was barred of his equity of redemption by reason of the foreclosure proceedings had by Hetty H. R. Green, filed in the United States circuit court for the northern district of Illinois, in the month of November, 1875, in a case in which Sarah H. Gage, William F.

44 Tucker, executor and guardian, and others were defendants, the said Tucker never having been personally sued or served with process or in any way submitted himself to the jurisdiction of said court, and that said finding deprived said complainant of his property without due process of law.

ROBERT RAE,
RICHARD S. THOMPSON,
F. B. DYCHE,
Solicitors for Appellant.

(Endorsed:) Filed July 7, 1892. S. W. Burnham, clerk.

45 On the same day, to wit, on the seventh day of July, in the July term of said court, 1892, in the record of the proceed-

ings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

Now comes the complainant, by his solicitor, and prays an appeal herein to the Supreme Court of the United States, which is allowed on complainant's filing an appeal bond herein according to law in the penal sum of three hundred dollars, with surety to be approved by the court.

46 Afterward, to wit, on the ninth day of July, 1892, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, John Evans Cornell and Paul Cornell, are held and firmly bound unto Hetty H. R. Green in the full and just sum of three hundred dollars, to be paid to the said Hetty H. R. Green, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between John Evans Cornell, complainant, and Hetty H. R. Green *et al.*, defendants, a decree was rendered against the said John Evans Cornell, and the said John Evans Cornell having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said Hetty H. R. Green, citing and admonishing her

47 to be and appear at a Supreme Court of the United States to be holden at Washington on the sixth day of August, 1892:

Now, the condition of the above obligation is such that if the said John Evans Cornell shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN EVANS CORNELL. [SEAL.]
PAUL CORNELL. [SEAL.]

Approved by—
W. Q. GRESHAM,
Circuit Judge.

July 9, 1892.

(Endorsed:) Filed July 9, 1892. S. W. Burnham, clerk.

48 EXHIBIT TO ORIGINAL CASE.

In the Circuit Court of the United States for the Northern District of the State of Illinois.

To the honorable judges of said circuit court, in chancery sitting:

Your oratrix, Hetty H. R. Green, who is a resident of Bellows Falls, in the State of Vermont, and a citizen of said last-named State, brings this her bill of complaint against Sarah H. Gage, a resident of the city of Chicago, Illinois, and citizen of the State of Illinois, and the widow of the late George W. Gage, of Chicago, deceased, and executrix of his last will and testament; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of the said George W. Gage, deceased, each of said children being now residents of the city of Chicago and citizens of the State of Illinois, the said two last-named children, George W. Gage, Jr., and David A. Gage, being minors; William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, State of Illinois, and citizens of said last-named State and guardians of said minor children, the said William F. Tucker being also one of the executors of the last will and testament of the said George W. Gage, deceased; Lewis L. Coburn, a resident of Chicago and citizen of the State of Illinois, also one of the executors of the last will and testament of the said George W. Gage, deceased; David A. Gage and John A. Rice, of the city of Chicago, each of whom is a citizen of the State of Illinois; Benjamin E. Gallup, Francis B. Peabody, and George L. Paddock, residents of the city of Chicago, each of whom is a citizen of the
49 State of Illinois; John N. Jewett and Charles T. Adams, residents of the city of Chicago and citizens of the State of Illinois; the Thayer and Tobey Furniture Company, a corporation organized under the laws of the State of Illinois and doing business in said city of Chicago; Julius White & Jonathan Goodwin, Jr., residents of the county of Cook aforesaid and citizens of the State of Illinois; the Mechanicks' National Bank of Chicago, a corporation organized under the laws of the United States and doing business at Chicago aforesaid so long as they continued in business; the Illinois Trust & Savings Bank, a corporation organized under the laws of the State of Illinois & doing business at the city of Chicago aforesaid; Moore C. White, Charles H. Gaubert, and James E. Gross, residents each of Cook county aforesaid and citizens each of the State of Illinois; the Chicago File Company, a corporation organized under the laws of the State of Illinois and doing business in Cook county aforesaid; Charles M. Smith, the president of said Chicago File Company, a resident of Chicago aforesaid and a citizen of the State of Illinois; Monroe Heath, a resident of Chicago and a citizen of the State of Illinois; William F. Milligan, resident of Chicago and citizen of the State of Illinois; Charles Tobey, a resident of the State of Illinois & resident of Chicago aforesaid, all of which persons & corporations before named are made defendants

herein; also the following-named persons and corporations: Donald Bremmer & Charles D. Welden, of Chicago, citizens of Illinois; Bradford Hancock, of Chicago aforesaid, a citizen of the State of Illi-
50 nois; William Coffin, resident of Batavia, in said State, a citizen of the State of Illinois; Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman & George F. Morcom, Clark Lipe, John B. Adams, David Kenly, George R. Jenkins, Charles F. Swift, all residents of Chicago aforesaid & each a citizen of the State of Illinois; Crane Bros. Manufacturing Company, a corporation organized under the laws of the State of Illinois & doing business at Chicago aforesaid; August Schiffer, resident of Will county, Illinois, a citizen of said last-mentioned State; the First National Bank of Sioux City, a corporation organized under the laws of the United States of America & doing business at Sioux City, State of Iowa, each of whom your oratrix asks may be made defendants to this bill.

And your oratrix complains and shows here to this honorable court that heretofore, to wit, on the seventh day of May, A. D. 1873, she loaned in money to the said George W. Gage, late of Chicago, deceased, and the said David A. Gage, last aforesaid mentioned, and the said John A. Rice, at Chicago aforesaid, the sum of one hundred thousand dollars ($100,000), to secure which sum of money the said George W. Gage, late of Chicago, deceased, and the said last-named David A. Gage and John A. Rice, on the seventh day of May, A. D. 1873, at Chicago aforesaid, made, executed, and delivered to your oratrix their certain promissory note, dated the day & year & place last aforesaid, in & by which said note, three years after the date thereof, they jointly and severally promised to pay to the order of your oratrix the principal sum of one hundred thousand dollars ($100,000), with interest thereon at the rate of ten (10) per cent. per annum, payable half yearly, to wit, on the
51 seventh day of November and of May in each year until said principal sum was fully paid, and both principal and interest payable at the office of John J. Cisco and Son, in the city of New York, said several instalments of interest aforesaid being further evidenced by six (6) interest notes or coupons of even date with said principal note & for the sum of five thousand dollars each.

Your oratrix further shows that it was further expressly agreed in and by said principal note that if default be made in the payment of any one of the installments of interest aforesaid at the time & place aforesaid when and where the same should become due & payable, and such default should continue for thirty days after such instalment becomes due and payable as aforesaid, then and in that event the said principal sum of one hundred thousand dollars ($100,000) should, at the election of the legal holder thereof, at once become and be due and payable, anything thereinbefore in said note contained to the contrary notwithstanding, such election to be made at any time after the expiration of said thirty days without notice—

A copy of which said principal note & the interest notes now unpaid thereon *are* annexed to this bill of complaint, marked Ex-

hibit A, to which your oratrix asks leave to refer for more particular description thereof, and prays that the same may be taken & treated as part of this bill. Your oratrix further shows to your honors that, for the better securing the payment of the said sum of money mentioned in said principal note, with the interest thereon as aforesaid, according to the true intent and meaning thereof, the said George W. Gage, one of
52 the makers of said note, and the said Sarah H. Gage, then his wife, by their certain indentures or deed of trust, dated the seventh day of May, A. D. 1873, and acknowledged by the said George W. Gage & wife on the sixteenth day of May, A. D. 1873, and delivered to your oratrix, and afterwards, on the seventeenth day of May, A. D. 1873, filed for record in the recorder's office of Cook county aforesaid, did convey unto Benjamin E. Gallup, before named, of the city of Chicago aforesaid, trustee, and his heirs, assigns, and successors, in trust, forever, all the certain lots, pieces, or parcels of land situate, lying, and being in the county of Cook, in the State of Illinois, known and described as follows, to wit: Lot numbered five (5), in block numbered thirteen (13), in fractional section fifteen (15), addition to Chicago, reference being had to the plat of said addition, which was recorded in the recorder's office of said Cook county in Book H of Maps, at page 230, new volume H, page 83, said lot fronting east on Michigan avenue between Harrison street and Hubbard court, with a width of eighty (80) feet, and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet, to a sixteen (16) foot alley, together with the three-story and basement brick dwelling-house, trimmed with stone, standing on said lot, and all other improvements thereon and all that may be placed thereon;

Also lots numbered (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block numbered three (3), in Egandale, which said Egandale is a sub-
53 division of the east one hundred & eighteen (118) acres of the southwest quarter of section eleven (11), in township thirty-eight (38) north, of range fourteen (14) east, of the third principal meridian, reference being had to the plat of said Egandale, which was filed for record in the recorder's office of said Cook county on June 12, 1868;

Also the south half ($\frac{1}{2}$) of section thirteen (13), in township thirty-eight (38) north, of range thirteen (13) east, of the third principal meridian, containing three hundred and twenty (320) acres, be the same more or less; also the south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirteen (13) aforesaid—

Together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said last-named George W. Gage and Sarah H. Gage of, in, and to the same and every part and parcel thereof, with the appurtenances:

To be held by the said Benjamin E. Gallup, his heirs, assigns, and successors in trust, in trust, among other things, that if default should be made in the payment of the said principal sum of money above mentioned, whether the same should have become due by election as aforesaid or by the regular maturity of said note three (3) years after the date thereof, or if the said last-named George W. Gage, his heirs or assigns,
54 should at any time thereafter until said principal sum and all arrearages of interest thereon should be fully paid, suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, or should do or permit to be done to, in, upon, or about said premises or any part thereof anything that might in anywise tend to diminish the value thereof, or to impair, weaken, or diminish the security intended to be effected under & by virtue of said deed of trust, or should neglect or fail to keep all the buildings, except outhouses, that at the time of the execution of said deed or thereafter might be situate upon said premises insured and cause such insurance to be made payable, in case of loss, to the said Benjamin E. Gallup or his successors in trust, and the policies of insurance and all renewal certificates thereof to be delivered to him or them, as provided in said deed of trust, or should fail to keep and perform all and singular the covenants and agreements contained in said deed of trust by the said last-named George W. Gage, his heirs or assigns, to be kept and performed, then and from thenceforth it should be lawful for the said Benjamin E. Gallup or his successors in trust, on application of the legal holder of said principal note, to sell and dispose of said premises at public auction, to the highest bidder, for cash, after advertising the same for sale in accordance with the provisions in that behalf in said deed of trust contained, and out of the proceeds arising from such sale the said trustee or his successors in trust should pay—

First. All the costs, charges, and expenses of such advertisement, sale, and conveyance, reserving to himself for his services a
55 commission of one per cent. upon the amount of the proceeds of such sale;

Second. All premium money paid for any insurance, as provided for in said deed of trust, and all money and sums of money which said party or his successors in trust or the legal holder of said principal note might at any time before such sale pay or expend to redeem said premises from any sale or sales for taxes or assessments, or to save the same from sale on account thereof, or to protect the title or possession of said premises or any part thereof, with interest *or any part thereof with interest* on all money so advanced or expended at the rate of ten per cent. per annum from the time of so expending the same up to the time of such sale;

Third. All of said principal money first mentioned in said trust deed and the accrued interest thereon that shall at the time of such sale remain unpaid; and,

Fourth. To render the overplus of the purchase-money, if any there should be, unto the said George W. Gage or assigns on reasonable request;

In and by which trust deed the said grantor therein, George W. Gage, & his said wife waived and released all right and benefit which they had or might be entitled to in and to said premises and the proceeds of the sale thereof under and by virtue of any act of the General Assembly of the State of Illinois relating to the exemption of homesteads from sale on execution.

Your oratrix further shows unto your honors that the said George W. Gage, grantor in said deed, therein covenanted and agreed that he would pay the principal sum of money and the interest thereon mentioned in said principal note according to the tenor and
56 effect thereof, and would not at any time thereafter, until the said principal sum and the interest thereon should be fully paid, suffer said premises or any part thereof to be sold for any tax or assessment or do or permit to be done to, in or upon, or about said premises anything that might in anywise tend to impair the value thereof or to weaken, diminish, or impair the security intended to be effected by said trust deed, and that until said principal sum of money and all arrearages of interest thereon should be paid he, his heirs and assigns, would keep all the buildings, outhouses excepted, on said land or thereafter to be erected thereon fully insured against loss or damage by fire in the fair insurable value of such buildings, the insurance to be made payable to the said trustee or his successors in trust, and to deliver to him or them the policies of insurance & all renewal certificates as soon as effected, and in default of so doing the said trustee or his successors in trust, at his or their option, might effect such insurance in his or their own name or otherwise, and the premium money paid therefor should be a charge upon said premises, and should be, and was thereby declared to be, secured by said trust deed in the same *named* as the said principal sum of money above mentioned, and that in the event said trust deed should be foreclosed by a judicial proceeding in any court there should be included in the judgment on such foreclosure the sum of one thousand dollars for the plaintiff's attorneys' or solicitors' fee in such proceeding.

It was further provided in said trust deed that in case of the death, absence from the city of Chicago, inability or refusal to act
57 of the said Benjamin E. Gallup at any time when his action under the foregoing powers and trusts may be required, then the said Francis B. Peabody, of Chicago aforesaid, should be and was by said trust deed thereby appointed and made successor in trust to the said Benjamin E. Gallup under said trust deed, with like powers and authority, and the title to said premises should thereupon become vested in said successor in trust for the uses and purposes in said trust deed set forth; and, further, that in the event of the death, absence from the city of Chicago, inability, or refusal to act of the said Peabody, then George L. Paddock, of Chicago, before named, should become the successor of said Peabody on like terms & conditions & with the same powers & authority, a copy of which trust deed is annexed to this bill of complaint, marked Exhibit "B," to which your oratrix asks leave to refer for a more particular description thereof and prays may be made part of this bill.

Your oratrix further shows unto your honors that default has been made in the payment of the several instalments of interest and the notes or coupons representing the same, for the sum of five thousand dollars each, which matured on the seventh day of November, 1874, & the seventh day of May, 1875, & the seventh day of November, 1875, respectively, which said default has continued on each of said instalments of interest last aforesaid, except the last mentioned, for more than thirty days after said instalments respectively become due and payable and still continues, and that neither the said George W. Gage nor his heirs or assigns nor the said David A. Gage or John A. Rice nor any one on their behalf have ever paid the same or any part thereof, but the same are still unpaid, together with interest thereon, at ten per cent. per annum, after ma-
58 turity, that being the rate of interest expressed in said interest or coupon notes.

Your oratrix further shows that she is the legal holder and owner of said principal note and of the said last-mentioned three coupon or interest notes, and also of the interest note or coupon maturing on the seventh day of May, 1876, and that by reason of such default, as before stated, your oratrix had the right to mature said principal note, and that heretofore, to wit, on the 18th November, 1875, in pursuance *with* the power conferred in said principal note & trust deed and after the expiration of the thirty days required therein for that purpose, she did elect & does now elect that the said principal sum of one hundred thousand dollars secured by said principal note become at once due and payable, all of which is now due and unpaid.

Your oratrix further shows that default has been made in the payment of taxes and assessments upon said premises, in violation of the terms of said trust deed.

That said George W. Gage in his lifetime, his heirs & assigns and his representatives since his death, have neglected to pay the same for the years 1873 & 1874, and that said premises have been sold or forfeited for the same, and that *that* there is due and to be paid for said taxes & assessments on the redemption of said premises from tax sales aforesaid several thousand dollars, to wit, —.

Your oratrix further shows that a further default under said trust deed has been made in the matter of keeping the buildings on said premises insured, as provided in said trust deed, and that by reason of the failure of the said grantors in said deed, their heirs & assigns and the representati*ons* of said Gage since his decease, to
59 keep said house on Michigan avenue so insured your oratrix has been compelled [and did, on the — day of November, 1875, cause the same to be insured, in order to save and protect her interest under said trust deed, and paid for such insurance the sum of one hundred dollars ($100), which by the terms of said trust deed has become an additional charge upon said premises and secured by said trust deed and is due and payable to your oratrix, together with interest thereon, at the rate of ten per cent. per annum, from the time of such payment.

Your oratrix further shows unto your honors that the said George

W. Gage, one of the grantors in said trust deed, heretofore, on the 22nd day of July, A. D. 1871, being indebted to the The Travelers' Insurance Company, a corporation duly organized and existing under the laws of the State of Connecticut, and located at Hartford, in said last-mentioned State, for an actual loan of money made to him on that *at* day, at Chicago aforesaid, in the sum of fifty thousand dollars, by the said The Travelers' Insurance Company, made, executed, and delivered to said insurance company his bond in the penal sum of sixty thousand dollars, signed with his hand and sealed with his seal and dated the day and year last aforesaid, to be paid to the said The Travelers' Insurance Company, its successors or assigns; for which payment, well and truly to be made, the said last-mentioned George W. Gage bound himself, his heirs, executors, and administrators, firmly by said bond.

The condition of said bond was such that if the said last-mentioned George W. Gage, his heirs, executors, or administrators, should well & truly pay or cause to be paid to the said
60 The Travelers' Insurance Company, its successors or assigns, the sum of fifty thousand dollars on the twenty-second day of July, in the year of our Lord 1874, with interest for the same, to be computed from said last-mentioned day, at the rate of nine per centum per annum, and to be paid half yearly, to wit, on the twenty-second day of each of the months of January and July in each year until the said principal sum should be fully paid, and which interest (until the maturity of said principal sum) was specified in & further evidenced by six coupons or interest notes signed by the said last-named George W. Gage, bearing even date with said bond and numbered from one to six, both inclusive, and the said payments, both of principal and interest, to be made at such place in the city of Hartford, in the State of Connecticut, as the said insurance company, its successors or assigns, should from time to time in writing appoint, and in default of such appointment, then at the office of said insurance company in said city of Hartford, then and in such case said bond to be void; otherwise to remain in full force & virtue: Provided, nevertheless, and it was thereby in said bond expressly agreed and fully understood, that if default should be made in the payment of any of the interest on the principal sum mentioned in said bond, payable half yearly as aforesaid, & any portion thereof should remain due and unpaid for the space of twenty days after the same should become due and payable according to the condition in said bond, then in such case the principal sum above mentioned, together with the arrearages of interest thereon, should at the option of the said insurance company, its successors or assigns, thereupon become due & payable also, and
61 might be demanded & collected immediately thereafter. It was further expressly declared in said bond that the same was made under & was in all respects to be construed by the laws of the State of Illinois.

Your oratrix further shows that for the better securing the payment of the said principal sum of money, with interest thereon, according to the true intent and meaning of said bond, the said

George W. Gage, the maker of said bond, and the said Sarah H. Gage, then his wife, by their certain indenture or deed of trust, dated the twenty-second day of July, A. D. 1871, & duly acknowledged by the said George W. Gage & wife on the twenty-eighth day of July, A. D. 1871, and delivered to the said The Travelers' Insurance Company, and afterwards, on the twenty-eighth day of July, A. D. 1871, duly recorded in the recorder's office of said county of Cook, did convey unto the said Julius White, of Cook county aforesaid, one of the defendants herein, trustee, his successors in trust and assigns forever, all the certain lots, pieces, or parcels of land situate, lying, and being in the county of Cook and State of Illinois, and known and described as follows, to wit:

The south half of section number thirteen (13), town. numbered thirty-eight (38);

The south five-eighths (south fifty acres) of the east half of the northeast quarter of section numbered thirteen (13), town. numbered thirty-eight (38), and

The east half of the northeast quarter of section numbered twenty-four (24), town. numbered thirty-eight (38), all being in range numbered thirteen (13) east of the third principal meridian, containing four hundred and fifty acres, more or less—

62 Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said George W. Gage and wife of, in, and to the same and every part and parcel thereof, with the appurtenances:

To have and to be held by the said Julius White, his successors in trust and assigns, in trust, among other things, that if default should be made in the payment of the said principal sum of money mentioned in said bond or the interest that might accrue thereon when the same should become due & payable either by the election of the legal holder of said bond, as provided in said bond or said trust deed given to secure the same, or by the maturity of said bond, and the said last-mentioned George W. Gage, his heirs, executors, or administrators, should at any time, until said last-named principal sum and all arrearages of interest thereon should be fully paid, suffer said last-described premises or any part thereof to be sold for any tax or assessment, or do or permit to be done to, in, upon, or about said last-described premises anything to diminish their value or tending to impair or diminish the security intended to be effected by virtue of said last-mentioned trust deed, or should neglect to keep all buildings upon said last described premises insured for the benefit of said insurance company, as provided in said trust deed last referred to, or fail in anywise to keep and perform all

63 and singular the covenants in said trust deed last aforesaid contained, that then & from thenceforth it should be lawful for said last-named trustee or his successors in trust, on the application of the legal holder of said bond, to sell and dispose of said

last-named premises and all the right, title, benefit, & equity of redemption of said George W. Gage & wife, their heirs and assigns, therein, at public auction, in the manner specifically provided and set forth in said trust deed last referred to, by advertisement in one of the newspapers that at the time of such sale should be published in the city of Chicago in the English language, and out of the money arising from such sale to pay and retain:

First. All charges and expenses made or sustained on account of said last-named trust, including all expenses of such advertisement, sale and conveyance, commissions on such sale, and all moneys that said White or his successors in trust might have advanced or which might be due for insurance, taxes, or assessments and redemption from the sales of said last-described premises for taxes and assessments or to protect his or their title thereto in any manner whatever, with interest at ten per centum per annum.

Second. All of said principal sum of money and accrued interest thereon that might at the time of such sale remain unpaid, whether due or not due.

Third. Rendering the overplus, if any there might be, unto the said last-named George W. Gage, his executors, administrators, or assigns, on reasonable request.

Your oratrix further shows that it was further covenanted and agreed in and by said last-named trust deed that if the said
64 White or his successors in trust should at any time advance money for insurance on the said last-described premises or to pay taxes or assessments thereon or to redeem from sales of the same for taxes or assessments or to protect his or their title thereto, in any manner whatever, such advances should be a charge upon said last-described premises and might be collected, with interest thereon, in the manner provided in said last-named trust deed.

That the said George W. Gage & wife therein expressly waived and released all right and benefit which they had or might be entitled to in said premises last described or the proceeds of the sale thereof under and by virtue of all acts of the General Assembly of the State of Illinois relating to the exemption of homesteads from sale on execution.

That said last-named trust deed, as well as that before mentioned from the said George W. Gage & wife to Benjamin E. Gallup, contained full covenants of warranty on the part of said last-named George W. Gage of seizure and perfect and absolute title in fee-simple in him, and that the premises mentioned in said trust deed respectively were at the time of such conveyances respectively free and clear from all former incumbrances.

That in the trust deed to said White the said George W. Gage further agreed until the payment of said principal sum & interest therein mentioned to pay all taxes & assessments upon said premises therein mentioned and to keep the buildings thereon insured to the insurable value thereof for the benefit of said insurance company and to protect their said security.

That Jonathan Goodwin, Jr., of Chicago aforesaid, one of the de-

fendants hereinbefore named, was named in said last-men-
65 tioned trust deed as successor in trust to the said White in case of the death, absence, inability, or refusal to act of the latter, & in that event the title to said premises described therein should vest in said Goodwin.

A copy of which last-named trust deed is hereto annexed, marked Exhibit "C," to which your oratrix asks leave to refer for a more particular description thereof, and prays that the same may be taken as part of her bill of complaint.

Your oratrix further states that on the 22nd day of July, A. D. 1874, at the maturity of said bond, the interest thereon, as your oratrix is informed and believes, having been paid up to that time, the payment of said principal sum mentioned therein was, by agreement of the parties thereto, extended one year, namely, to July 22nd, 1875, and the said George W. Gage, the maker of said bond, on said 22nd day of July, 1874, at Chicago aforesaid, executed and delivered to said insurance company for the interest accruing on said bond for that year his two interest or coupon notes for the sum of twenty-two hundred & fifty dollars each, dated the day & year last aforesaid, payable to the said The Travelers' Insurance Company or order on the 22nd day of Janu*ray* & July, 1875, respectively, with interest at ten per centum per annum after due, a copy of which said bond and the interest notes given for the interest on the extension thereof *are* attached to this bill, marked Exhibit D, to which your oratrix refers for more particularity.

Your oratrix further shows that default has been made in the payment both of said principal sum of fifty thousand dollars
66 mentioned in said bond and of said instalments of semi-annual interest thereon due the 22nd day of January & July, 1875, respectively, and the same, together with interest thereon as specified in said bond and interest notes, are still due and unpaid.

That there has been a further default in the matter of the payment of the taxes and assessments upon said last-described premises for the years 1873 & 1874; that said premises or the greater portion thereof have been sold for such taxes or assessments or forfeited to the State therefor; that said George W. Gage in his lifetime, his heirs & assigns, and his representatives since his decease have neglected to pay the same or redeem said premises last described from such sales & forfeitures, and that there is now due and to be paid for said taxes & assessments or to redeem the same several thousand dollars, to wit, $—.

Your oratrix further shows that said trust deed to Benjamin E. Gallup, first herein described, covered all the premises mentioned in said trust deed to Julius White, second herein described, except the east half of the northeast quarter of section twenty-four, township thirty-eight north, of range thirteen east, of the third principal meridian, but that said trust deed to White was the prior lien on all said premises described in said last-named deed to White, the said trust deed to Gallup being the second lien on such of said premises as was covered by both said trust deeds; that said George W. Gage last named in and by said trust deed to the said Gallup covenanted

& agreed, for himself, his heirs, executors, and administrators, that he was seized of a perfect, absolute, & indefeasible estate of
67 inheritance in the law in fee-simple in said premises described therein, & that the same were free from all former incumbrances.

That he & those succeeding him as heirs and executors become thereby bound to pay off or remove said incumbrance to said White, so that said deed to said Gallup should stand as a first lien on the said last-described premises and to protect the security of your oratrix against said deed to said White.

That, having failed to do this, your oratrix was obliged to and did, for her protection, heretofore, to wit, on the 13th day of September, A. D. 1875, purchase of said The Travelers' Insurance Company the said bond of fifty thousand dollars and the said two interest or coupon notes of twenty-two hundred & fifty dollars each, paying therefor the full amount of said bond & interest notes & the interest thereon at the rate specified therein up to the time of such purchase, and that she is now and has been since said purchase the legal owner & holder of said bond & interest notes last mentioned and the said trust deed given to secure the same, and that the same are now due to your oratrix and wholly unpaid, together with the interest thereon as aforesaid.

Your oratrix further shows that the said George W. Gage, the maker of said notes, heretofore, to wit, on the 24th day of September, 1875, at Chicago aforesaid, departed this life, leaving him surviving the said Sarah H. Gage, his widow, and the said Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., David A. Gage, his only children (the last two named being minors), and leaving a last will and testament, in & by
68 which he appointed the said William F. Tucker, Lewis L. Coburn, & his said widow executors & executrix, and devised to them, upon certain conditions therein named, all his real estate, having before that time, as appears by the records in said recorder's office, by deed executed by himself & wife, dated December 18th, 1874, and recorded in said recorder's office December 19, 1874, for consideration, as expressed in said deed, of $24,000, conveyed to said Tucker all said premises herein described, subject to said incumbrances.

Your oratrix further shows that said above-named parties against whom this bill of complaint is brought have or claim to have some interest in said premises described in said trust deed by mortgage judgment, conveyance, or otherwise; but your oratrix states those interests, whatever they are, are subject to the rights of your oratrix under her securities before mentioned and cannot be set up against the same nor in any way interfere therewith.

Your oratrix further shows that there is now due her on said principal note hereinbefore first mentioned the sum of one hundred thousand dollars and interest thereon, at the rate of ten per centum, from the seventh day of November, A. D. 1875, and the said three interest notes of five thousand dollars each and interest thereon at the same rate of interest from the date of their maturity

respectively, and also said principal sum of fifty thousand dollars mentioned in said bond given to said The Travelers' Insurance Company and assigned to your oratrix as aforesaid, together with the interest thereon from the twenty-second day of July, A. D. 1875,
and said two interest notes or coupons of twenty-two hun-
69 dred & fifty dollars each and the interest thereon from the
maturity thereof respectively, at the rate of ten per cent. per annum.

And also the sum of one hundred dollars so paid by your oratrix for insurance and interest thereon.

That your oratrix well hoped that the said George W. Gage in his lifetime and his representatives since his decease and the said David A. Gage and John A. Rice would have paid said principal note and interest thereon as the same became due and payable, and that said George W. Gage and his representatives would have paid and discharged the remaining portion of said indebtedness hereinbefore set forth and said advances so made by your oratrix as aforesaid and interest thereon as aforesaid;

But now so it is, may it please your honors, that they and each and all of them and all of said defendants have hitherto wholly failed & neglected and still do neglect to pay the same, and the same is now due and unpaid to your oratrix as aforesaid.

All which actings and doings are contrary to equity and good conscience and tend to the manifest injury of your oratrix.

By reason of the premises aforesaid your oratrix has the right to a decree of this honorable court for the payment of said indebtedness and to a foreclosure of said trust deed, and, in case of the nonpayment of said indebtedness by the time to be fixed by this court, to an order directing the sale of said premises to pay the same.

70 To the end, therefore, that the amount due your oratrix under, upon, & by virtue of said securities now owned and held by her as aforesaid and for advances made by her as aforesaid & such advances as she may hereafter make under said deeds for taxes, assessments, or otherwise be correctly ascertained & fixed, and that she have a decree for the same, directing the same to be paid to her by some day to be named therein, and that in the event of the non-payment thereof on or before that day that said premises be sold to pay the same according to the rules of equity and the practice of this court, and that the purchaser or purchasers at such sale be put into possession of that portion of the premises purchased by them respectively, and that your oratrix, or her agent or attorney for and on her behalf, may have the right to bid & to become the purchaser at said sale, and that if necessary a receiver may be appointed at any time during the pendency of this suit to take charge of said premises and to receive the rents & profits of the same according to the rules and practice of this court, your oratrix asks the aid of this hon. court;

And for such other & further relief as to equity & good conscience may seem fit & proper.

May it please your honors to grant to your oratrix a writ of summons, issued out of and under the seal of this honorable court, ac-

cording to the rules and practice of said court, directed to the said Sarah H. Gage & the other defendants hereinbefore named, commanding them and each of them, by a certain day and under a certain penalty therein named, to appear and answer all and singular the matters aforesaid as fully and explicitly as if the same
71 were here repeated and they particularly interrogated thereto, but without oath, their answer under oath being hereby expressly waived, and, further, to stand to and abide such order and decree in the premises as to your honors shall seem meet.

By GEO. F. BAILEY, *Solicitor.*

GEO. F. BAILEY, *Of Counsel.*

EXHIBIT A.

$100,000.00. CHICAGO, ILLINOIS, *May 7th*, 1873.

Three (3) years after date, for value received, we jointly & severally promise to pay to the order of Hetty H. R. Green the principal sum of one hundred thousand (100,000) dollars, with interest thereon at the rate of ten (10) per cent. per annum, payable half yearly, to wit, on the seventh day of November and of May in each year, until said principal sum is fully paid, and both principal and interest payable at the office of John J. Cisco & Son, in the city of New York. The several instalments of interest aforesaid for said period of three (3) years are further evidenced by six (6) interest notes or coupons of even date herewith.

It is further expressly agreed that if default be made in the payment of any one of the instalments of interest aforesaid, at the time and place aforesaid, when and where the same becomes due and payable, and such default shall continue for thirty days after such installment becomes due and payable as aforesaid, then and in that event the said principal sum of one hundred thousand (100,000) dollars shall, at the election of the legal holder hereof, at once become and be due and payable, anything hereinbefore contained to the contrary notwithstanding; such election to be made at
72 any time after the expiration of said thirty days without notice.

The payment of this note is secured by trust deed on real estate in Cook county, Illinois.

(S'd) GEO. W. GAGE.
(S'd) D. A. GAGE.
(S'd) JOHN A. RICE.

EXHIBIT A.

$5,000.00. CHICAGO, ILLINOIS, *May 7th*, 1873.

Due to the order of John J. Cisco & Son, for credit of Hetty H. R. Green, five thousand (5,000) dollars on the 7th day of May, A. D. 1876, without grace, at the office of John J. Cisco & Son, in the city of New York, with interest, at the rate of ten per cent. per annum, after maturity, being for an installment of interest due on that day

upon our joint and several principal promissory note of even date herewith, payable to the order of Hetty H. R. Green three (3) years after its date, for the sum of one hundred thousand (100,000) dollars, secured by trust deed upon real estate in Cook county, Illinois.

In consideration of the premises we jointly and severally do hereby make and appoint George L. Paddock or any other attorney of any court of record in the United States of America to be our and each of our true and lawful attorney, for us and each of us and in our and each of our name, place, and stead to appear in any court of record, in term time or vacation, in any State, district, or Territory of the United States, at any time after this interest coupon becomes due, to waive service of process, accept a declaration,
73 and confess a judgment in favor of the legal holder hereof for the amount due and unpaid hereon, with interest as aforesaid to the day of entering such judgment, together with costs and 100 dollars for the attorneys' fee, and to file a cognovit of such amounts, with an agreement therein that execution may issue forthwith, and that no writ of error or appeal shall be prosecuted upon said judgment nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment or issuing the execution thereon, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

No. 6.

GEO. W. GAGE.
D. A. GAGE.
JOHN A. RICE.

EXHIBIT A.

$5,000.00. CHICAGO, ILLINOIS, *May 7th*, 1873.

Due to the order of John J. Cisco & Son, for credit of Hetty H. R. Green, five thousand (5,000) dollars on the 7th day of November, A. D. 1875, without grace, at the office of John J. Cisco & Son, in the city of New York, with interest, at the rate of ten per cent. per annum, after maturity, being for an instalment of interest due on that day upon our joint and several principal promissory note of even date herewith, payable to the order of Hetty H. R. Green three (3) years after its date, for the sum of one hundred thousand (100,000) dollars, secured by trust deed upon real estate in Cook county, Illinois.

74 In consideration of the premises we jointly and severally do hereby make and appoint George L. Paddock or any other attorney of any court of record in the United States of America to be our and each of our true and lawful attorney, for us and each of us and in our and each of our name, place, and stead to appear in any court of record, in term time or vacation, in any State, district, or Territory of the United States, at any time after this interest coupon becomes due, to waive service of process, accept a declaration, and confess a judgment in favor of the legal holder hereof for the amount due and unpaid hereon, with interest as aforesaid to the day of entering such judgment, together with costs and 100 dol-

lars for the attorneys' fee, and to file a cognovit of such amounts, with an agreement therein that execution may issue forthwith, and that no writ of error or appeal shall be prosecuted upon said judgment nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment or issuing the execution thereon, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

No. 5.

GEO. W. GAGE.
D. A. GAGE.
JOHN A. RICE.

$5,000.00. CHICAGO, ILLINOIS, *May 7th*, 1873.

Due to the order of John J. Cisco & Son, for credit of Hetty H. R. Green, five thousand (5,000) dollars on the 7th day of May,
75 A. D. 1875, without grace, at the office of John J. Cisco & Son, in the city of New York, with interest, at the rate of ten per cent. per annum, after maturity, being for an installment of interest due on that day upon our joint and several principal promissory note of even date herewith, payable to the order of Hetty H. R. Green three (3) years after its date, for the sum of one hundred thousand (100,000) dollars, secured by trust deed upon real estate in Cook county, Illinois.

In consideration of the premises we jointly and severally do hereby make and appoint George L. Paddock or any other attorney of any court of record in the United States of America to be our and each of our true and lawful attorney, for us and each of us and in our and each of our name, place, and stead to appear in any court of record, in term time or vacation, in any State, district, or Territory of the United States, at any time after this interest coupon becomes due, to waive service of process, accept a declaration, and confess a judgment in favor of the legal holder hereof for the amount due and unpaid hereon, with interest as aforesaid to the day of entering such judgment, together with costs and 100 dollars for the attorneys' fee, and to file a cognovit of such amounts, with an agreement therein that execution may issue forthwith, and that no writ of error — appeal shall be prosecuted upon said judgment nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment or issuing the execution thereon, hereby ratifying and confirming all that our said attorney
76 may *bo* by virtue hereof.

No. 4.

G. W. GAGE.
D. A. GAGE.
JOHN A. RICE.

$5,000. CHICAGO, ILLINOIS, *May 7th*, 1873.

Due to the order of John J. Cisco & Son, for credit of Hetty H. R. Green, five thousand (5,000) dollars on the 7th day of November, A. D. 1874, without grace, at the office of John J. Cisco & Son, in

the city of New York, with interest, at the rate of ten per cent. per annum, after maturity, being for an instalment of interest due on that day upon our joint and several principal promissory note of even date herewith, payable to the order of Hetty H. R. Green three (3) years after its date, for the sum of one hundred thousand dollars (100,000), secured by trust deed upon real estate in Cook county, Illinois.

In consideration of the premises we jointly and severally do hereby make and appoint George L. Paddock or any other attorney of any court of record in the United States of America to be our and each of our true and lawful attorney, for us and each of us and in our and each of our name, place, and stead to appear in any court of record, in term time or vacation, in any State, district, or Territory of the United States, at any time after this interest coupon becomes due, to waive service of process, accept a declaration, and confess a judgment in favor of the legal holder hereof for the amount due and unpaid hereon, with interest as aforesaid to the day of entering such judgment, together with costs and 100 dollars for the attorneys' fee, and to file a cognovit of such amounts, with an
77 agreement therein that execution may issue forthwith, and that no writ of error or appeal shall be prosecuted upon said judgment nor any bill in equity filed to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up said judgment or issuing the execution thereon, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

No. 3.

G. W. GAGE.
D. A. GAGE.
JOHN A. RICE.

EXHIBIT B.

This indenture made this seventh (7th) day of May, in the year of our Lord, one thousand eight hundred and seventy-three (1873) between George W. Gage and Sarah H., his wife, of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and Benjamin E. Gallup, of the city of Chicago, aforesaid, party of the second part,

Witnesseth, that whereas, the said George W. Gage and David A. Gage and John A. Rice, are jointly and severally justly indebted unto Hetty H. R. Green in the principal sum of one hundred thousand (100,000) dollars, lawful money of the United States of America, being for an loan thereof, on the day of the date hereof made by said Hetty H. R. Green to said George W. Gage, David A. Gage and John A. Rice secured to be paid by a certain principal promissory note of the said George W. Gage, David A. Gage and John A. Rice, bearing even date herewith, payable to the order of the said Hetty H. R. Green, in and by said principal note the said George W. Gage,
78 David A. Gage and John A. Rice jointly and severally promise to pay to the order of the said Hetty H. R. Green the principal sum of one hundred thousand (100,000) dollars three (3) years after date thereof, with interest thereon at the rate of ten (10)

per cent. per annum, payable half yearly on the seventh (7th) day of November and May in each year until said principal sum is fully paid and both principal and interest payable at the office of John J. Cisco & Son in the city of New York, which said several instalments of interest for said period of three (3) years are further evidenced by six (6) interest notes or coupons of even date herewith for the sum of five thousand (5,000) dollars each, in and by which said principal note it is agreed that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place when and where the same becomes due and payable as aforesaid, and such default shall continue for thirty days after such installment becomes due and payable as aforesaid, then, at the election of the legal holder of said principal note, the said principal sum of one hundred thousand (100,000) dollars shall at once become due and payable, anything thereinbefore contained to the contrary notwithstanding, such election to be made at any time after the expiration of said thirty days, without notice. Now, therefore, the said party of the first part, for the better securing the payment of the said sum of money mentioned in said principal note, with the interest thereon according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained,
79 sold, aliened, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, release, convey, and confirm unto the said party of the second part and his heirs, assigns and successors in trust, forever, all the certain lots, pieces, or parcels of land situate, lying and being in the county of Cook in the State of Illinois, known and described as follows to wit,

Lot numbered five (5) in block numbered thirteen (13) in fractional section fifteen (15) addition to Chicago, reference being had to the plat of said addition which was recorded in the recorder's office of said Cook county in Book H of Maps at page 230 new volume H page 83, said lot fronting east on Michigan avenue between Harrison street and Hubbard court with a width of eighty (80) feet and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet to a sixteen (16) foot alley, together with the three story and basement brick dwelling-house, trimmed with stone standing on said lot and all other improvements thereon, and all that may be placed thereon.

Also lots numbered one (1) four (4) five (5) eight (8) nine (9) twelve (12) thirteen (13) sixteen (16) and seventeen (17) in block numbered three (3) in Egandale, which said Egandale is a subdivision of the east one hundred & eighteen (118) acres of the southwest quarter of section eleven (11) in township thirty-eight (38) north of range fourteen (14) east of the third principal meridian, reference being had to the plat of said Egandale, which was filed for record in the recorder's office of said Cook county, on June 12, 1868.

Also, the south half ($\frac{1}{2}$) of section thirteen (13) in township thirty-eight (38) north of range thirteen (13) east of the third prin-

cipal meridian, containing three hundred and twenty (320)
80 acres be the same more or less.

Also, the south fifty (50) acres of the east half (½) of the northeast quarter (¼) of section thirteen (13) aforesaid.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also, all the estate right, title, interest, dower and right of dower, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances.

To have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part, his heirs, assigns, and successors in trust forever.

In trust nevertheless, that if default shall be made in the payment of the said principal sum of money above mentioned, (whether the same shall have become due by election as aforesaid, or by the regular maturity of said note three (3) years after the date thereof) or if the said George W. Gage, his heirs or assigns, shall at any time hereafter, until said principal sum, and all arrearages of interest thereon, shall be fully paid, suffer said premises or any part thereof *of* to be sold for any tax or assessment whatsoever, or shall do or permit to be done, to, in, upon or about said premises, or any part thereof, anything that may in anywise tend to diminish the value thereof, or to impair, weaken, or diminish the security intended to be effected under and by virtue of this instrument,
81 or shall neglect or fail to keep all the buildings, except outhouses that now are or hereafter may be situate upon said premises insured, and cause such insurance to be made payable, in case of loss, to the party of the second part, or his successors in trust, and the policies of insurance and all renewal certificates thereof to be delivered to him or them, as hereinafter covenanted and provided, or shall fail in anywise promptly and faithfully to fulfill, keep and perform all and singular the covenants and agreements contained in these presents, by him or them to be kept and performed then and from thenceforth it shall be lawful for the said party of the second part, or his successors in trust, on application of the legal holder of said principal note with or without a previous entry upon said premises to sell and dispose of said premises hereby granted or intended so to be, and all right, title, benefit and equity of redemption of said party of the first part, their heirs and assigns therein at public auction to the highest bidder for cash, having first given twenty days' notice of the time and place of such sale (such sale to be made at a door of such building as shall then be used as the court-house of the county of Cook in the city of Chicago, and State of Illinois,) by advertisement in any one of the daily newspapers that may at that time be published in the English language in said city of Chicago, personal notice of such sale to said party of the first part, their heirs or assigns, or any person claiming by, through or under them being hereby expressly

waived and excused, and in the name of the said party of the second part, or his successors in trust, to make, execute
82 and deliver to the purchaser or purchasers at such sale, a good and sufficient deed or deeds of conveyance in the law for the premises sold in fee-simple, and all the recitals that may be contained in such deed or deeds setting forth the fact of such default as aforesaid, due notice, advertisements and sale and any and all such other facts and statements as may be proper to evidence the legality of such sale and conveyance, and that the same has been duly made in all respects so as to meet all the requirements herein contained or arising in law and as may be necessary to convey a good title, shall be deemed to be true, and shall be considered and taken on all occasions and as between all persons as *prima facie* evidence of the truth of all the facts and matters set forth in such recitals and such deed or deeds shall be effectual to pass the title and all the right and equity of redemption of said party of the first part their heirs and assigns, in and to the premises sold, and out of the money arising from such sale, the said party of the second part, or his successors in trust, shall pay,

First. All the costs, charges and expenses of such advertisement, sale and conveyance, reserving to himself for his services, a commission of one (1) per cent. upon the amount of the proceeds of such sale.

Second. All premium money paid for any insurance as hereinafter provided, and all money and sums of money which said party of the second part, or his successors in trust or the legal holder of said principal note may at any time before such sale pay or expend to redeem said above-described premises from any sale or sales for taxes or assessments, or to save the same from sale on account
83 thereof, or to protect the title or possession of said premises, or any part thereof with interest on all money so advanced or expended at the rate of ten per centum per annum from the time of so paying or expending the same up to the time of such sale.

Third. All of said principal money first hereinbefore mentioned and the accrued interest thereon, that shall at the time of such sale remain unpaid, and,

Fourth. Render the overplus of the purchase-money, if any there be, unto the said George W. Gage, his heirs or assigns on reasonable request.

And it shall not be obligatory upon the purchaser or purchasers at such sale to see to the application of the purchase-money, which sale or sales so made shall be a perpetual bar both in law and equity against the said party of the first part, their heirs and assigns, and all other persons claiming or to claim the said premises, or any part thereof by, from or under them, or any of them. And the said party of the first part, for the purpose of enabling said party of the second part and his successors in trust to make an advantageous and judicious sale of said premises, do hereby authorize and empower him or them to adjourn said sale from time to time, at his or their discretion, of which adjourned sale it shall be sufficient to give ten days' notice by advertisement in such newspaper as aforesaid,

the first publication whereof to be on the day following the day on which, but for such adjournment, said sale should have taken place, and the party of the second part, or his successors in trust need not go to the said place of sale to announce such adjournment,
84 and at such sale, said party of the second part or his successors in trust, may sell said premises entire without division or in parcels, as he or they may elect.

And the said party of the first part, for the consideration above mentioned, do hereby expressly waive and release all right and benefit which they have or to which they may be entitled in and to said premises and the proceeds of sale thereof, under and by virtue of an act of the General Assembly of the State of Illinois, entitled "An act to exempt homesteads from sale on execution" approved February 11th, A. D. 1851, and also an act entitled "An act to amend an act to exempt homesteads from sale on execution" approved February 17th, A. D. 1857, as well as under any and all other acts of said General Assembly of a like character or for a similar purpose, and agree to surrender possession of said premises to the purchaser or purchasers at such sale peaceably on demand.

And the said George W. Gage, for himself, his heirs, executors and administrators, does covenant, bargain and agree to and with the said party of the second part, his successors in trust and his and their heirs and assigns, that he is well seized of the premises above described as of a good, sure, perfect absolute and indefeasible estate of inheritance in the law in fee-simple and has good right, full power, and lawful authority to grant bargain, sell and convey the same in manner and form as aforesaid, and that the same are free from all other and former grants, mortgages liens, incumbrances and from taxes, assessments and sales therefor, of any name kind, nature or description whatsoever, and the same in the peaceable and quiet possession of the party of the second part, his
85 successors in trust, his and their heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, he and they will warrant and forever defend.

And the said George W. Gage for himself, his heirs, executors and administrators does covenant, grant and agree to and with the said party of the second part, and his successors in trust, that he will well and truly pay the principal sum of money and interest thereon mentioned in said principal note, according to the tenor and effect thereof, and will not, at any time hereafter until the said principal sum and the interest thereon shall be fully paid, suffer said premises, or any part thereof, to be sold for any tax or assessment whatsoever, nor do, nor permit to be done, to, in, upon or about said premises anything that may in anywise tend to impair the value thereof, or to weaken, diminish or impair the security intended to be effected under and by virtue of this instrument.

And further that, he, his heirs and assigns, shall and will at all times hereafter, until said principal sum of money, and all arrearages of interest thereon shall be fully paid, keep all the buildings, outhouses excepted now situate, or that may hereafter be erected

upon said land, fully insured against loss, or damage by fire in some good and responsible insurance company or companies (the selection of such insurance company or companies to be subject to the approval of the said party of the second part, or his successors in trust) in the fair insurable value of such buildings and cause such insurance to be made payable, in case of loss, to the said party of the second part, or his successors in trust, and deliver to him or them, each, all and every of the policies of insurance therefor, as soon
86 as and whenever such insurance shall be effected and all renewal certificates of such policies, and in default of so doing, the said party of the second part, or his successors in trust, at his or their option may effect such insurance in his or their own name or names or otherwise, and the premium money paid therefor shall be a charge upon said premises, and shall be and is hereby declared to be secured by this instrument in the same manner as the said principal sum of money above mentioned is secured, and such premium money shall be paid by said George W. Gage, his heirs, executors or administrators to the said party of the second part, or his successors in trust, on demand and may be collected at any time after the same shall have been paid, with interest thereon at the rate of ten per centum per annum from the time the same shall be advanced, and the said party of the second part, or his successors in trust shall hold each and all such policies of insurance as collateral and additional security for said principal sum of money and interest and shall have the right to collect and receive any and all money and sums of money that may at any time become colle-*ta*ble or receivable upon each, all and every of such policies of insurance by reason of the damage or destruction of such buildings by fire, and apply the same, when received, in the same manner, as far as possible, as is hereinbefore provided for the application of the proceeds of a sale — above-described premises under the power of sale hereinbefore contained, or if the legal holder of said principal note so elects, shall disburse the same in the repair or rebuilding of such buildings. But nothing herein contained shall be construed as requiring the said party of the second part or his successors in
87 trust, to incur any expense or make any effort to collect any money that may become due on any of such policies of insurance, but if he, or they shall elect not to collect the same, he or they shall make such election within a reasonable time after such money shall become collectible and on demand of said George W. Gage, his heirs or assigns, shall thereupon forthwith after making such election not to collect, execute any necessary order or assignment to cause said insurance money to be paid to said George W. Gage, his heirs or assigns.

A reconveyance of said premises shall be made by the party of the second part, or his successors in trust, to said George W. Gage, his heirs or assigns, at his or their expense, on full payment of the indebtedness aforesaid and performance of the covenants and agreements made herein by the party of the first part.

And in case of the death, absence from the city of Chicago, inability or refusal to act of the said party of the second part at any

time when his action under the foregoing powers and trusts may be required, then Francis B. Peabody, of Chicago aforesaid, shall be, and he hereby is appointed and made successor in trust to the said party of the second part, under this deed, with like powers and authority, and the title to said premises shall thereupon become vested in said successor in trust, for the uses and purposes aforesaid.

And in case of the death, absence from the city, of Chicago inability or refusal to act of said party of the second part and of the said Francis B. Peabody at any time when action under the
88 foregoing powers and trusts may be required, then George L. Paddock, of Chicago aforesaid, shall be and he hereby is, appointed and made successor in trust to said party of the second part and the said Francis B. Peabody under this deed, with like powers and authority, and the title to said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

It is understood and agreed that in the event this trust deed be foreclosed by a judicial proceeding in any court, there shall be included in the judgment on such foreclosure the sum of one thousand dollars for the plaintiff's attorneys' or solicitors' fee in such proceeding.

In testimony whereof, the said party of the first part have hereunto set their hands and seals at Chicago aforesaid, the day and year first above written.

GEORGE W. GAGE. [L. S.]
SARAH H. GAGE. [L. S.]

STATE OF ILLINOIS, } 88:
County of Cook, City of Chicago, }

I, Henry Rieke, a notary public in and for the said city, in the county and State aforesaid, and residing in said city, in said county and State, do hereby certify that George W. Gage and Sarah H., his wife, who are personally known to me to be the real persons whose names are subscribed to the foregoing instrument as having executed the same, appeared before me this day in person and severally acknowledged that they signed, sealed, and delivered the
89 said instrument as their free and voluntary act for the uses and purposes therein set forth, and thereby conveyed all their right, title, and interest in and to the premises described in said instrument and expressly waived and released all right, claim, benefit, privilege, advantage, exemption under any and all homestead exemption laws, so called, in the State of Illinois.

And the said Sarah H. Gage, wife of the said George W. Gage, having been by me examined separate and apart from and out of the hearing of her said husband and the contents and meaning of said instrument and her rights under the homestead exemption laws of the State of Illinois having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the said instrument and relinquished her dower and all her rights, title, and interest to the lands and tenements therein

mentioned and expressly waived and released all right, claim, benefits, privilege, advantage, and exemption under any and all such homestead exemption laws without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this 16th day of May, A. D. 1873.

HENRY RIEKE,
Notary Public.

[SEAL.]

EXHIBIT C.

This indenture made this 22nd day of July, in the year of our Lord, one thousand eight hundred and seventy-one between George W. Gage and Sarah H. his wife, of the county of Cook in the State of Illinois party of the first part, and Julius White of the
90 county and State aforesaid, party of the second part, witnesseth that,

Whereas, George W. Gage, one of the said party of the first part is justly indebted unto The Travelers' Insurance Company, a corporation duly organized and existing under the laws of the State of Connecticut and located at the city of Hartford, in said State of Connecticut in the sum of fifty thousand dollars secured to be paid by the certain bond of the said George W. Gage bearing even date herewith in the penal sum of sixty thousand dollars conditioned for the payment unto the said The Travelers' Insurance Company, its successors or assigns of the sum of fifty thousand dollars on the twenty-second day of July in the year of our Lord, one thousand eight hundred and seventy-four with interest thereon from the day of the date of the said bond at the rate of nine (9) per centum per annum to be paid half yearly to wit, on the twenty-second day of each of the months of January and July in each and every year until the said principal sum shall be fully paid and which interest (until the maturity of said principal sum) is specified in and further evidenced by six coupons or interest notes of even date herewith signed by the said George W. Gage and numbered one to six both inclusive, which payments both of principal and interest are to be made at such place in the city of Hartford in the State of Connecticut as the said The Travelers' Insurance Company its successors or assigns may from time to time in writing appoint, and in default of such appointment, then at the office of said company in the city of Hartford in said State of Connecticut under which bond there is a proviso written whereby it is agreed that if default be made in the payment of any of the interest on the said
91 principal sum payable half yearly as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty days after the same shall become due and payable according to the condition of the said bond as aforesaid then and in such case the principal sum above mentioned with all arrearages on interest thereon shall at the option of the said The Travelers' Insurance Company its successors or assigns at once become due and payable and may be demanded and collected immediately thereafter, anything thereinbefore contained to the contrary notwithstanding.

Now, therefore this indenture witnesseth that the said party of the first part for the better securing the payment of the said principal sum of money with interest thereon according to the true intent and meaning of the said bond and also in consideration of one dollar to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part his successors in trust and assigns forever all the certain lots, pieces or parcels of land situate, lying and being in the county of Cook and State of Illinois, and known and described as follows, to wit:—

The south half of section numbered thirteen (13) town. numbered thirty-eight (38).

The south five-eighths (south fifty acres) of the east half of the northeast quarter of section numbered thirteen (13) town. numbered thirty-eight (38) and the east half of the northeast quarter of section numbered twenty-four (24) town. numbered thirty-eight (38)

92 All being in range numbered thirteen (13) east of the third principal meridian containing four hundred and fifty acres more or less. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title interest dower and right of dower, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of in and to the same and every part and parcel thereof with the appurtenances.

To have and to hold the above granted, bargained and described premises with the appurtenances unto the said party of the second part his successors in trust and assigns forever.

In trust nevertheless, that if default shall be made in the payment of the said principal sum of money or the interest that may accrue thereon, or any part thereof, when the same becomes due and payable either by election of the legal holder of the said bond under the provisions of the said bond, or of this instrument, or by the maturity of the said bond or if the said George W. Gage, his heirs executors or administrators shall at any time until said principal sum and all arrearages on interest thereon shall be fully paid, suffer said premises or any part thereof to be sold for any tax or assessment whatsoever or shall do or permit to be done, to, in upon or about said premises anything that may in anywise tend to diminish the value thereof or to impair, weaken or diminish the security intended to be effected under and by virtue of this instrument or shall neglect to keep all buildings upon said prem-

93 ises insured and the policies of insurance delivered to said party of the second part or his successors in trust as hereinafter provided or shall fail in anywise fully to keep and perform all and singular the covenants and agreements herein contained, that then and from thenceforth it shall be lawful for the said party of the second part or his successors in trust on application of the legal

holder of said bond with or without a previous entry upon said premises, to sell and dispose of the premises hereby granted or intended so to be and all right, title, benefit and equity of redemption of the said party of the first part, their heirs or assigns therein at public auction at the north door of the court-house in Cook county, Illinois to the highest bidder for cash having first given twenty days' notice of the time and place of such sale by advertisement in any one of the daily newspapers that may then be published in the city of Chicago in the English language, personal notice of such sale to the party of the first part their heirs, executors, administrators or assigns or any and all persons claiming by, through or under them being hereby expressly waived and excused and in the name or names of the said party of the second part or his successors in trust to make, execute and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance for the premises sold, in the law for the same in fee-simple, and all the recitals which may be contained in such deed or deeds shall be deemed and taken as true and *prima facie* evidence thereof and out of the money arising from such sale to pay and retain:

First. All charges and expenses made or sustained on ac-
94 count of this trust, including all the expenses of sale, advertisement sale and conveyance, commissions on such sale, and all moneys that the said party of the second part, or his successors in trust may have advanced, or which may be due for insurance, taxes or assessments and redemption from the sales of the said premises for taxes or assessments or to protect his or their title thereto in any manner whatever with interest on such advances at ten per centum per annum.

Second. All of said principal sum of money and accrued interest thereon that may at *that* time of such sale remain unpaid whether due or not due.

Third. Rendering the overplus if any there be unto the said George W. Gage his executors, administrators or assigns upon reasonable request.

And the said party of the second part or his successors in trust may adjourn such sale from time to time and for such time as he or they may judge best and may also at such sale sell the said premises entire without division or in parcels in his or their discretion. And it shall not be obligatory upon the purchaser or purchasers at such sale to see to the application of the purchase-money. Which sale so made shall be a perpetual bar both in law and equity against the said party of the first part their heirs, *heirs* and assigns and all persons claiming or to claim the said premises or any part thereof, by, from, through, or under them or any of them.

And said party of the first part agree to sur-ender possession of the said premises to the purchaser or purchasers at such sale peaceably on demand.

95 And if the said party of the second part or his successors in trust shall at any time advance money for insurance on the said premises or to pay taxes or assessments thereon, or to redeem from sales of the same for *for* taxes or assessments or to pro-

tect his or their title thereto in any manner whatever such advances shall be a charge upon the said premises and may be collected with interest thereon in the manner hereinbefore provided.

And the said party of the first part for the consideration above mentioned and in order to create a first lien and incumbrance on said premises under this deed for the purposes aforesaid and to carry out the foregoing specific application of the proceeds of any sale that may be made by virtue thereof do hereby expressly waive and release all right and benefit which they have in and to said premises or to which they may be entitled in said premises or the proceeds of sale thereof, under and by virtue of an act entitled "An act to exempt homesteads from sale on execution" passed by the General Assembly of the State of Illinois and approved February 11th A. D. 1851 and also an act entitled "An act to amend an act to exempt homesteads from sale on execution," passed by the said assembly and approved February 17th, A. D. 1857, as well as any and all other acts of a like character or for a similar purpose.

And the said George W. Gage, one of the said party of the first part for himself, his heirs, executors, and administrators does covenant grant, bargain and agree to and with the said party of the second part his successors in trust and assigns that at the time of the ensealing and delivery of these presents he was well seized of the premises above conveyed as of a good, sure, perfect, absolute
96 and indefeasible estate of inheritance, in law in fee-simple, and had good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales liens, taxes assessments and encumbrances of what kind and nature soever, and the above-bargained premises in the quiet and peaceable possession of the party of the second part his successors in trust and assigns against all and every other person and persons lawfully claiming or to claim the whole or any part thereof the said George W. Gage will warrant and forever defend and that until the said principal sum of money and all arrearages of interest thereon shall be fully paid he will pay or cause to be paid all taxes and assessments on the said premises when the same shall become due and payable and that he will not do or permit to be done, to, in, upon or about the said premises anything that may in anywise tend to diminish the value thereof or to weaken or impair the security intended to be effected under and by virtue of this instrument. And that he will keep all buildings upon the said premises insured in such good and reliable insurance company or companies as the said party of the second part or his successors in trust may select for the insurable value thereof the policy or policies of such insurance to be either in the name or names of the said party of the second part or his successors in trust or to be so drawn that the loss, if any, shall be payable to him or them and to be held by him or them as additional security for the payment of the said bond and the interest thereon, but such fire insurance shall not at any time be required for a greater sum than the amount of the said
97 indebtedness then remaining unpaid.

A reconveyance of said premises to be made to said George W. Gage his heirs or assigns at his expense on full payment of the indebtedness aforesaid and performance of the covenants and agreements made herein by the said party of the first part.

And in case of the death, absence, inability or refusal to act of said party of the second part then Jonathan Goodwin, Jr., of the said city of Chicago, shall be, and he hereby is appointed and made successor in trust to said party of the second part under this deed with like powers and authority and said premises shall thereupon become vested in said successor in trust for the uses and purposes aforesaid.

And in case of the death, absence inability or refusal to act of said party of the second part and of the said Goodwin, then Francis A. Hoadley, shall be, and he hereby is appointed and made successor in trust to said party of the second part and the said Goodwin under this deed with like powers and authority and the said premises shall thereupon become vested in the said successor in trust for the uses and purposes aforesaid.

In witness whereof, the said party of the first part have hereunto set their hands and seals at the said city of Chicago the day and year first above written.

GEO. W. GAGE.
SARAH H. GAGE.

98 STATE OF ILLINOIS, } ss:
County of Cook, City of Chicago, }

I, Fred. A. Newton, a notary public in and for said city, in county and State aforesaid, do hereby certify that George W. Gage and Sarah H. Gage, his wife, personally known to me as the real persons whose names are subscribed to the foregoing instrument as having executed the same, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth, and thereby conveyed all their right, title, and interest in and to the premises described in said instrument and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called; and the said Sarah H. Gage, wife of the said George W. Gage, having been examined by me separate and apart and out of the hearing of her husband and the contents and meaning of said instrument and her rights under the homestead law of the State of Illinois having been by me made known and fully explained to her, acknowledged that she had freely and voluntarily executed the same and relinquished her dower and conveyed all estate, right, title, and interest to the lands and tenements therein mentioned, and expressly waived and released all right, claim, benefit, privilege, advantage, and exemption under any and all homestead exemption laws, so called, without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this twenty-eighth day of July, A. D. 1871.

[NOTARIAL SEAL.] F. A. NEWTON,
Notary Public.

99 EXHIBIT D.

$50,000. *Bond.* No. 21.

Know all men by these presents that I, George W. Gage, of the city of Chicago, in Cook county, State of Illinois, am held and firmly bound unto The Travelers' Insurance Company, a corporation duly organized and existing under the laws of the State of Connecticut, and located at the city of Hartford, in said State, in the penal sum of sixty thousand dollars, lawful money of the United States of America, to be paid unto the said The Travelers' Insurance Company, its successors or assigns; for which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated at Chicago, in the State of Illinois, this twenty-second day of July, in the year of our Lord one thousand eight hundred and seventy-one.

The condition of this obligation is such that if the above-bounden George W. Gage, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the said The Travelers' Insurance Company, its successors or assigns, the sum of fifty thousand dollars on the twenty-second day of July which will be in the year of our Lord one thousand eight hundred and seventy-four, with interest for the same, to be computed from the day of the date hereof, at and after the rate of nine (9) per centum per annum, which interest shall be paid half yearly, to wit, on the twenty-second day of each of the months of January and July which will
100 be in each and every year, until the said principal sum shall be fully paid, and which interest shall be fully paid, and which interest (until the maturity of said principal sum) is specified in and further evidenced by six (6) coupons or interest notes, bearing even date herewith, signed by the said George W. Gage and numbered from one to six, both inclusive, and the said payments, both of principal and interest, shall be made at such place in the city of Hartford, in the State of Connecticut, as the said The Travelers' Insurance Company, its successors or assigns, may from time to time in writing appoint, and in default of such appointment, then at the office of said company in said city of Hartford, then and in such case this bond to be void; otherwise to remain in full force and virtue:

Provided, nevertheless, and it is hereby expressly agreed and fully understood, that if default be made in the payment of any of the interest on the principal sum above mentioned, payable half yearly as aforesaid, and any portion thereof shall remain due and unpaid for the space of twenty days after the same shall become due and payable according to the above condition, then, in such case, the principal sum above mentioned together with the arrearages of interest thereon, shall, at the option of the said The Travelers' Insurance

Company, its successors or assigns, thereupon become due and payable and may be demanded and collected immediately thereafter, anything hereinbefore contained to the contrary notwithstanding.

It is hereby expressly declared that this bond or obligation is made under and is in all respects to be construed by the laws
101 of the State of Illinois, and is given for an actual loan of money made at the said city of Chicago by the said The Travelers' Insurance Company to the said George W. Gage on the day of the date hereof.

GEORGE W. GAGE. [SEAL.]

(Endorsed.)

For value received I hereby sell, assign, and transfer all my right, title, and interest in and to the within bond to —— ——, without recourse.

—— ——.

For value received The Travelers' Insurance Company of Hartford, Connecticut, hereby sells, assigns, and transfers all its right, title, and interest in and to the within bond to —— ——, without recourse.

THE TRAVELERS' INSURANCE CO.
OF HARTFORD, CT.,
By RODNEY DENNIS, *Sec'y.* [SEAL.]

$2,250. EXHIBIT D.

Due The Travelers' Insurance Company or order twenty-two hundred and fifty dollars on the twenty-second day of July, A. D. 1875, without grace, and with interest at ten per centum per annum after due, payable at such place in the city of Hartford, in the State of Connecticut, as it, its successors or assigns, in writing appoint, and in default of such appointment, then at the office of The Travelers' Insurance Company in said city of Hartford, being for the payment of the half-yearly interest due that day on my bond to said Travelers' Insurance Company of date 22 July, A. D. 1871,
102 conditioned for the payment of fifty thousand dollars on the twenty-second day of July, A. D. 1874, and which is hereby extended to 22 July, A. D. 1875.

Chicago, 22nd July, 1874.

No. 2. GEO. W. GAGE.

(Endorsed:) Pay —— —— or order, without recourse. The Travelers' Insurance Co. of Hartford, Ct., by Rodney Dennis, sec'y. (Seal.)

$2,250. EXHIBIT D.

Due The Travelers' Insurance Company or order twenty-two hundred and fifty dollars on the twenty-second day of January, A. D. 1875, without grace, and with interest at ten per centum per annum

after due, payable at such place in the city of Hartford, in the State of Connecticut, as it, its successors or assigns, may in writing appoint, and in default of such appointment, then at the office of The Travelers' Insurance Company in said city of Hartford, being for the payment of the half-yearly interest due that day on my bond to said Travelers' Insurance Company of date 22nd July, A. D. 1871, conditioned for the payment of fifty thousand dollars on the twenty-second day of July, A. D. 1874, and which is hereby extended to July 22nd, 1875.

Chicago, 22nd July, 1874.

GEO. W. GAGE.

(Endorsed:) Pay —— —— or order, without recourse. The Travelers' Insurance Co. of Hartford, Ct., by Rodney Dennis, sec'y. (Seal.)

(Endorsed:) Filed Nov. 27, 1875. Wm. H. Bradley, clerk.

103 *Chancery Subpœna.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to Sarah H. Gage, widow of the late George W. Gage, deceased, and executor of his will; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of said George W. Gage, deceased; William F. Tucker, Joseph K. Barry, and John W. Clapp, guardian, &c., and William F. Tucker, executor, &c.; Lewis L. Coburn, executor, &c.; David A. Gage, and John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, the Thayer & Tobey Furniture Company, Julius White, Jonathan Goodwin, Jr., the Mechanics' National Bank of Chicago, the Illinois Trust & Savings bank, Moore C. White, Charles A. Gaubert, James E. Gross, the Chicago File Company, Charles M. Smith, president of said Chicago File Company, Monroe Heath, William F. Milligan, Donald Bremmer, Charles D. Weldon, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenley, George R. Jenkins, Charles F. Swift, Crane Bros. Manufacturing Company, August Shiffer, the First National Bank of Sioux City, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first
Monday in the month of January next, to answer the bill of
104 complaint of Hetty H. R. Green this day filed in the clerk's
office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 27th day of November, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 100th.

[SEAL.]

WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the annexed writ by personally delivering a true and correct copy thereof to each of the following-named defendants on the day set opposite their names:

Upon William F. Milligan, Monroe Heath, Bradford Hancock, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, Jonathan Goodwin, Jr., John B. Adams, Clark Lipe, David A. Gage, Julius White, and William F. Tucker as guardian and William F. Tucker as executor, on the 8th day of December, A. D. 1875; upon
105 Alexander S. Maltman, on the 10th day of December, A. D. 1875; upon Sarah H. Gage, Alexander A. McDonnell, David Kenley, George R. Jenkins, and Charles F. Swift, on the 14th day of December, A. D. 1875; upon Moore C. White, on the 31st day of December, A. D. 1875. I also served the same upon the following-named defendants, not having been able to find them to serve personally, by leaving a true and correct copy for each of them at their usual places of abode with an adult person and a member of their respective families, to wit: Upon Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, on the 14th day of December, A. D. 1875, with Mrs. Sarah H. Gage, their mother; upon the Illinois Trust and Savings Bank, on the 8th day of December, A. D. 1875, with James S. Gibbs, cashier; I was not able to find the president to serve; upon the Thayer and Tobey Furniture Company, on the 14th day of December, A. D. 1875, with Charles Tobey, the president; upon James E. Gross, on the 14th day of December, A. D. 1875, with Mrs. Lawrence; upon Crane Brothers Manufacturing Company, on the 14th day of December, A. D. 1875, with Jacob D. Skinkle, the president of said company; upon the Chicago File Company, on the 31st day of December, A. D. 1875, with E. R. Dewey, the superintendent of said company; I was not able to find the president to serve; upon Charles A. Gaubert, on the 31st day of December, A. D. 1875, with Frank Wentworth. I did not serve Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, August Shiffer, First National Bank of Sioux City, and William

Coffin, by order of compl't's att'y. I was not able to find the other defendants in my district to serve.

106 B. H. CAMPBELL,
U. S. Marshal,
By A. C. CAMPBELL.

Marshal's Fees.

32 services	64	
32 copies	16	
32 miles	1	92
	$81	92

(Endorsed:) Filed Jan'y 6th, A. D. 1876. Wm. H. Bradley, clerk.

107 *Answer of Heath and Milligan.*

Circuit Court of United States for the Northern District of Illinois.
In Chancery.

HETTY H. R. GREEN *vs.* SARAH H. GAGE *et als.* } 13072, 760.

The joint and several answer of Monroe Heath and William F. Milligan, two of the defendants, to the bill of complaint of the above-named complainant.

These defendants, saving and reserving unto themselves all benefit of exception that may be taken to the many errors, uncertainties, and imperfections in said bill of complaint contained, for answer thereto, or to such parts thereof as they are advised it is material for them to make answer unto, answering, say:

That they are not informed, save by reading said bill, as to the indebtedness claimed by the complainant in her said bill, nor as to the making of the bonds and trust deeds and securities as therein set forth, nor as to the interest of the complainant and the other defendants in said bill named in the real estate and several premises therein described, and these defendants are strangers to all of said matters and things (except as to these defendants' interest in the premises hereinafter described) and can neither admit nor
108 deny the same as in the bill set forth, but require strict proof of all of said matters. These defendants, further answering, say that they are and for several years last past have been copartners in business in the city of Chicago, Cook county, Illinois, under the firm name of Heath & Milligan; that they have and claim a lien, under the mechanics' lien law of the State of Illinois, upon a portion of the real estate and premises in said bill described, said portion being known and described as follows, to wit:

Lot number five (5), in block number thirteen (13), in the Canal

Trustees' subdivision of fractional section fifteen (15), addition to Chicago, being a lot fronting eighty (80) feet on Michigan avenue and running back of that width one hundred and seventy (170) feet to an alley situate between Harrison street and Hubbard court, and the three story and basement brick dwelling-house situate and being thereon—

Said lien being for work and materials done and furnished upon and for said dwelling-house by these defendants at the request of and by agreement with George W. Gage in his lifetime as follows: On or about the 26th day of April, 1873, these defendants, at the request of said George W. Gage, then living, commenced the calsomining, painting, glazing, waxing, cleaning, and decorating and frescoing of said dwelling-house and the furnishing of the labor and materials necessary therefor, and thereafter *contained* in the prosecution and completion of said work until about the first day of December, 1874, as the said Gage requested and directed, at which last date the work aforesaid upon said house was by these
109 defendants fully completed to the satisfaction of said Gage; that there was no contract price specified between these defendants and said Gage for such work and materials, and that said Gage was liable to them for the fair and reasonable value thereof, and that the same were at the time of the doing of such work fully and reaso*b*ably worth the sum and price of five hundred twenty-eight & $\frac{97}{100}$ dollars ($528.97), which sum was due from said Gage to these defendants upon the completion of said work, on December 1, 1874, and remains still due and upaid, and for which sum, with legal interest thereon since that date, these defendants have by the laws of said State and claim a first lien upon said house and the said lot of land on which the same stands, as before mentioned.

That on the 6th day of January, 1875, these defendants filed in the circuit court of Cook county their petition for the enforcement of said lien of said sum so due under said mechanics' lien law as a first lien upon said premises, in which petition said Gage was made a party defendant, together with all other persons who were known to these defendants as having any interest in said premises, and that on the 17th day of March, 1875, the default of said Gage was entered of record in said cause and the petition taken as confessed as to him, and that said cause is still pending and undetermined in said circuit court of Cook county, as by the records thereof will more fully appear.

These defendants, further answering, say that the premises aforesaid upon which they performed such work was improved, beautified, and increased in value thereby and by the work and
110 labor and materials so furnished by them thereon more than the amount of said sum so due therefor; that such work and materials were in the nature of valuable and substantial improvements upon said premises, and became and are a part thereof, and said property has received great benefit therefrom, and that by law there defendants have and are entitled to have and maintain a first lien upon said premises, over and above and superior to either of

the trust deeds mentioned in said bill and superior to any lien, claim, or interest of the complainant or any other party to this suit therein.

These defendants therefore ask that these rights and interest in said premises may be protected by this honorable court, and that in case of a sale of the same by order of this court that these defendants may be paid out of the proceeds thereof the amount of their claim and lien, with interest since December 1, 1874, in satisfaction thereof.

And, having answered said bill, these defendants pray hence to be dismissed with *this* reasonable costs.

MONROE HEATH &
WILLIAM F. MILLIGAN,
By L. S. SWEZEY,
Their Solicitors.

BONFIELD, SWEZEY & SMITH,
Def'ts' Sol'rs.

(Endorsed:) Filed Jan'y 11, 1876. Wm. H. Bradley, clerk.

111 *Alias Subpœna.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to Charles M. Smith, Charles A. Mather, George F. Morcum, and August Shiffer, impleaded with Sarah H. Gage *et al.*, Greeting:

We command you and every of you again that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of February next, to answer the bill of complaint of Hetty H. R. Green, filed November 27, 1875, in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 12th day of January, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 100th.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against
112 them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

(*Marshal's Return.*)

I did not serve the defendants, having been unable to find them, or that they had any residence within my district.

B. H. CAMPBELL,
U. S. Marshal,
By I. N. BUCK, *Deputy.*

(Endorsed:) Filed Feb'y 9th, A. D. 1876. Wm. H. Bradley, clerk.

113 *Affidavit of Non-residence.*

STATE OF ILLINOIS, } ss:
County of Lake, }

In the Circuit Court of the United States in and for the Northern District of Illinois.

HETTY H. R. GREEN }
vs. } In Chancery.
SARAH H. GAGE *et al.* }

Geo. F. Bailey, being duly sworn, doth depose and say that the above-entitled cause is commenced to enforce an equitable lien upon the title to certain real estate within said northern district of Illinois, to wit, to foreclose a trust deed upon certain real estate in said district.

That John A. Rice, one of the defendants named in the bill hereinabove filed, is not an inhabitant of nor is he to be found within said district; that a subpœna has been issued out of this court, directed to the United States marshal of said district, and returned by him not found as to said defendant John A. Rice, and said Rice has not voluntarily entered his appearance herein.

Deponent further says that, as he is informed and believes, said Rice is now an inhabitant of the city of Philadelphia, in the State of Pennsylvania, and asks that an order may be made by this
114 court directing such absent defendant to appear, plead, answer, or demur in said suit by a day certain to be designated by the court in accordance with the statute in such case made and provided.

GEO. F. BAILEY.

Subscribed and sworn to before me this 19th day of January, A. D. 1876.

E. H. BEEBE,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Jan'y 21, 1876. Wm. H. Bradley, clerk.

115 FRIDAY, *January* 21, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE *et al.* } 13072. In Chancery.

Now comes the complainant, by George F. Bailey, Esq., her solicitor, and it appearing to the court from affidavit filed herein that John A. Rice, one of the defendants herein, is not an inhabitant of and cannot be found within the northern district of Illinois, and that he has not voluntarily entered his appearance in this cause, on motion of said complainant's solicitor, it is ordered by the court that said absent defendant, John A. Rice, appear, plead, answer, or demur to the complainant's bill of complaint herein by the first Monday of March, A. D. 1876, and that personal service of a copy of this order be had upon said absent defendant at least twenty days before said first Monday of March, A. D. 1876.

116 *Alias Subpœna.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

The United States of America to Charles M. Smith and August Shiffer, impleaded with Sarah H. Gage *et al.*, Greeting:

We command you and every of you again that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of March next, to answer the bill of complaint of Hetty H. R. Green, filed November 27, 1875, in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 12th day of February, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 100th.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to
117 which the above writ is returnable, the complainant's bill will be taken against them as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

(Marshal's Return.)

I have served the within writ within my district in the following manner, to wit:

Upon Charles M. Smith therein named on the 12th day of February, A. D. 1876, by personally delivering to him a true copy of the same on the aforesaid day.

B. H. CAMPBELL,
U. S. Marsha-,
By L. O. GILMAN, *Deputy.*

Marshal's Fees.

1 service	$2 00
1 copies	50
	$2 50

Special Deputy's Return.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Know all men by these presents that I have appointed and by these presents do appoint D. G. Bain my true and lawful deputy to execute the annexed writ, Hetty H. R. Green *vs.* Chas. M. Smith *et al.*, and to make return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit:

By delivering a true copy thereof to August Shiffer, therein
118 named, on the 15 day of Feb., A. D. 1876.

B. H. CAMPBELL,
United States Marshal,
By D. G. BEAN,
Special Deputy.

Marshal's Fees.

1 copies	$ 50
60 miles	3 60
1 service	2 00
Oath and certificate of service	25
	$6 35

D. G. Bean, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

Sworn to before me this fifteenth day of February, A. D. 1876.

TRUMAN HULING,
[SEAL.] *Notary Public.*

(Endorsed:) Filed March 2d, A. D. 1876. Wm. H. Bradley, clerk.

119 *Answer of John N. Jewett et al.*

UNITED STATES OF AMERICA, }
Northern District of Illinois. }

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

HETTY H. R. GREEN }
vs. } Bill.
SARAH H. GAGE *et al.* }

The joint and several answer of John N. Jewett & Charles T. Adams, two of the defendants named in the bill of complaint of the said complainant.

These defendants, reserving to themselves all benefit and advantage of exception to the said bill, for answer thereto say that on or about the 19th day of December, A. D. 1873, one George W. Gage and Sarah H., his wife, by their certain deed of trust, duly executed and acknowledged, conveyed to this defendant, John N. Jewett, the premises in the said bill first described, in trust, to secure the payment of the four certain promissory notes fully described in the answer of the Tobey Furniture Company, now on file in this cause and to which reference is hereby made; that the said trust deed was thereafter and on or about the 9th day of January, A. D. 1874, duly recorded in the office of the recorder of deeds of Cook county, Illinois, and that the defendant Charles T. Adams was in the said trust deed named as successor in trust to the said Jewett; and these
120 defendants, further answering, say upon information and belief that the said notes represented a *bona fide* indebtedness and are now held and owned by one Charles Tobey, the said Thayer and Tobey Furniture Company having, before the maturity of any of them, assigned and transferred them and each of them by endorsement to the said Charles Tobey, and that the said Charles Tobey is a resident of Chicago, Illinois; and these defendants, further answering, say that as to all and singular the remaining allegations of the said bill they have no knowledge, information, or belief, nor has either of them, other than that derived from the said bill, and they therefore neither admit nor deny the same.

And, having answered the said bill, they pray to be hence dismissed, &c.

JOHN N. JEWETT &
CHARLES T. ADAMS,
By JEWETT & ADAMS,
Their Sol'rs.

JNO. N. JEWETT, *Of Counsel.*

(Endorsed:) Filed March 1, 1876. Wm. H. Bradley, clerk.

121 *Answer of Tobey Furniture Company.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

HETTY H. R. GREEN, Complainant, *vs.* SARAH H. GAGE *et al.*, Defendants. } Nos. 13072, 760. Bill for Foreclosure.

The several answer of The Tobey Furniture Company, sued by the name of The Thayer and Tobey Furniture Company, one of the defendants, to the bill of complaint of the above-named complainant.

This defendant, now and at all times hereafter saving unto itself all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering, says:

That it is informed and believes it to be true that on or about the 7th day of May, A. D. 1873, the said George W. Gage and Sarah H., his wife, executed and delivered to Benjamin E. Gallup, as
122 trustee, a certain deed of trust, conveying the premises, all and singular, in the said bill first described, but as to whether or not the said deed of trust is correctly set out in said bill, and as to whether or not the said deed of trust was given to secure the indebtedness alleged in the said bill, and as to whether or not there has been any default in the conditions of the said deed of trust, this defendant is not informed, save by the said bill, and therefore it demands proof of all and singular the allegations in the said bill contained in those regards.

And this defendant, further answering, says that it is informed and believes it to be true that on or about the 28th day of July, A. D. 1871, the said George W. Gage and Sarah H., his wife, executed and delivered to one Julius White a certain deed of trust, conveying thereby all and singular the premises in the said bill secondly described, but as to whether or not the terms and conditions of the said deed of trust named are correctly described in the said bill, and as to whether or not defaults have been made in the terms and conditions of said deed of trust as alleged in said bill, and as to whether or not the said deed of trust was given to secure the indebtedness for which it is alleged in the said bill it was given to secure, and as to whether or not the said complainant is the legal owner and holder of said indebtedness, as to all and singular the allegations of the said bill in those regards this defendant is not informed, save by the said bill, and therefore it calls for full proof of the same.

And this defendant, further answering, says that on or about the 19th day of December, A. D. 1873, the said George W. Gage
123 and the said defendant John A. Rice were indebted to the Thayer and Tobey Furniture Company, a corporation organized and doing business under and by virtue of the laws of the State of Illinois, in the sum of forty-three thousand seven hundred and ninety-one & $\frac{92}{100}$ dollars ($43,791.92) for goods, wares, and merchandise before that time sold and delivered to the said Gage and Rice; that on the said day last named the said Gage and Rice, in order to secure the payment of the said indebtedness, executed and delivered to the said Thayer and Tobey Furniture Company their four joint and several promissory notes of that date, each in the sum of ten thousand nine hundred forty-seven & $\frac{98}{100}$ dollars ($10,947.98), two of said notes being payable on or before December 19th, 1874, and the other two of said notes being payable on or before December 19th, 1875, and all of said notes bearing interest at the rate of ten per cent. per annum, payable semi-annually, which said notes are now in the possession of this defendant, ready to be produced in court, and to which for greater certainty this defendant craves leave to refer when the same are produced.

And this defendant, further answering, says that on the said 19th day of December, A. D. 1873, in order to further secure the payment of the said notes, the said George W. Gage and Sarah H., his wife, executed and delivered to the said defendant, John N. Jewett, their deed of trust, in and by which they conveyed to the said Jewett all and singular the premises in the said bill first described, upon certain trusts and conditions in such deed named; that the said deed last named was duly acknowledged and was, on or about the 9th day of January, A. D. 1874, duly recorded in the office of the recorder of deeds of Cook county, Illinois, in Book 347 of Records, at page 424, which said deed of trust is now in the possession of this defendant ready to be produced in court, and to which for
124 greater certainty this defendant craves leave to refer when the same is produced.

And this defendant, further answering, says that the said notes are all long past due and payable by the terms thereof, but that no part of the principal or of the interest thereof has ever been paid; that on or about the 1st day of December, A. D. 1874, the said Thayer and Tobey Furniture Company, for a good and valuable consideration, assigned and transferred by indorsement each and every of the said notes to one Charles Tobey, of Cook county, Illinois, and that the said Charles Tobey has ever since been and is now the legal owner and holder of the said notes; that thereafter and on or about the 1st day of January, A. D. 1875, the said Thayer and Tobey Furniture Company changed its name, in accordance with the provisions of the statute of Illinois in such case made and provided, and adopted the name of the Tobey Furniture Company, which last name has ever since been the proper corporate name of said company.

And this defendant, further answering, admits the death of the said George W. Gage as alleged in said bill, and states on informa-

tion and belief that the estate of the said Gage is wholly insolvent, and that the said John A. Rice is now insolvent; that the only security for the payment of said notes *on* the premises described in the said deed of trust to the said John N. Jewett, and that unless something can be realized from the said premises towards the payment of the said notes the entire amount thereof will be lost to the said Charles Tobey.

And this defendant, further answering, insists that if the said complainant should upon the hearing of said cause sustain by due proof the allegations of her said bill and show herself entitled
125 to have a sale of the premises described in the trust deed to the said Gallup, and also of the premises described in the trust deed to the said White, then in equity the land embraced in the said trust deed to the said White and not embraced in the said trust deed to the said Jewett should be first resorted to for satisfaction of the indebtedness that may be found to be secured by the said trust deed to the said White, and, further, that all and singular of the premises embraced alike in the trust deeds to the said Gallup, the trust deed to the said White, and the trust deed to the said Jewett should, if practicable, be sold in separate lots and the smallest legal subdivisions, so that the said Tobey may have an opportunity to protect the security of the said notes hereby himself, as aforesaid; and this defendant further shows to the court that if a sale of the said premises should be made in masse that the security of the said notes would be wholly lost for the reason that, as this defendant believes, the said complainant would bid the entire amount of her claim thereupon and no persons would be found who would bid more.

And this defendant, having fully answered the said bill, prays to be hence dismissed with its costs, &c.

TOBEY FURNITURE COMPANY,
By JEWETT & ADAMS, *Its Sol'rs.*

JNO. N. JEWETT, *Of Counsel.*

(Endorsed:) Filed March 1, 1876. Wm. H. Bradley, clerk.

126 *Replication to Answer of Heath and Milligan.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

The replication of Hetty H. R. Green, complainant, to the answer of Monroe Heath & William F. Milligan, two of the defendants.

This repliant, saving and reserving to herself all and all manner of advantage of exception to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereto saith that she does & will aver, maintain, and prove her said bill of

complaint to be true, certain, & sufficient in the law to be answered by the said defendants, and that the answers of said defendants is uncertain, evasive, and insufficient in law to be replied to by this repliant; without this, that any other matter or thing in said answer contained material or effectual in the law to be replied unto and not herein & hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to maintain, aver, & prove as this hon. court shall direct, and humbly prays as in and by her said bill she has already prayed.

GEO. F. BAILEY,
Sol'r for the Complainant.

(Endorsed:) Filed March 3, 1876. Wm. H. Bradley, clerk.

127 *Certified Copy of Order.*

Circuit Court of the United States for the Northern District of Illinois.

FRIDAY, *January* 21*st*, *A. D.* 1876.

Present: The Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE *et al.* } In Chancery.

Now comes the complainant, by George F. Bailey, Esq., her solicitor, and it appearing to the court from affidavit filed herein that John A. Rice, one of the defendants herein, is not an inhabitant of and cannot be found within the northern district of Illinois, and that he has not voluntarily entered his appearance in this cause, on motion of said complainant's solicitor, it is ordered by the court that said absent defendant, John A. Rice, appear, plead, answer, or demur to the complainant's bill of complaint herein by the first Monday of March, A. D. 1876, and that personal service of a copy of this order be had upon said absent defendant at least twenty days before said first Monday of March, A. D. 1876.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the
128 order entered of record in said court on the 21st day of January, A. D. 1876, in the cause wherein Hetty H. R. Green is the complainant and Sarah H. Gage *et al.* are the defendants, as the same appears from the records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 22d day of January, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

9—160

UNITED STATES OF AMERICA, }
Northern District of the State of Illinois, City of Chicago, } *ss:*

I, George F. Bailey, being duly sworn, on oath say that I am personally acquainted with John A. Rice, the defendant mentioned in the foregoing certified copy of an order entered the 21st day of January, A. D. 1876, in said circuit court of the United States for said northern district of Illinois, in a cause wherein Hetty H. R. Green is complainant & Sarah H. Gage *et al.* are defendants, and that on the twenty-seventh (27th) day of January, A. D. 1876, at the city of Philadelphia, in the State of Pennsylvania, I delivered to the said John A. Rice a true copy of the foregoing certified copy of said order.

GEO. F. BAILEY.

Subscribed & sworn to before me March 6, 1876.
E. A. DRUMMOND, *U. S. Com'r.*

(Endorsed:) Filed March 6, 1876. Wm. H. Bradley, clerk.

129 *Appearance of Defendants The 1st Nat'l Bank of Sioux City and William Coffin.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States in and for the Northern District of Illinois, of the January Term, A. D. 1876.

HETTY H. R. GREEN }
vs. } Bill of Foreclosure.
SARAH H. GAGE *et al.* }

We hereby enter the appearance herein of the defendants The First National Bank of Sioux City and William Coffin.

TENNEY, FLOWER & ABERCROMNIE,
Def'ts' Sol'rs.

(Endorsed:) Filed March 6, 1876. W. H. Bradley, clerk.

130 *Appearance of Charles A. Mather.*

Circuit Court of the United States for the Northern District of Illinois, —— Term, A. D. 1875.

HETTY H. R. GREEN, Compl't, }
vs. } In Chancery.
SARAH H. GAGE *et al.* }

We do hereby enter the appearance of Charles A. Mather, one of the defendants in the above-entitled cause.

MATTOCKS & MASON,
Solicitors for said Defendant.

(Endorsed:) Filed March 6, 1876. Wm. H. Bradley, clerk.

131 *Appearance of Mechanics' National Bank.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for the Northern District of Illinois. In Chancery.

HETTY H. R. GREEN } Bill for Foreclosure.
vs.
SARAH H. GAGE *et al.* }

We hereby enter the appearance of the Mechanics' National Bank of Chicago, one of the defendants in the above-entitled cause.

McCAGG, CULVER & BUTLER,
Sol'rs for Mech. Nat'l B'k.

(Endorsed:) Filed March 6, 1876. Wm. H. Bradley, clerk.

132 *Appearance of Peabody, Gallup, and Paddock.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for the Northern District of Illinois, of the January Term, A. D. 1876.

HETTY H. R. GREEN } Bill for Foreclosure.
vs.
SARAH H. GAGE *et al.* }

I hereby enter the appearance of Benjamin E. Gallup, Francis B. Peabody, and George L. Paddock in the above-entitled cause.

GEO. L. PADDOCK,
Sol'r for said Benjamin E. Gallup, Francis B. Peabody, Person.

(Endorsed:) Filed March 6, 1876. Wm. H. Bradley, clerk.

133 *Appearance of G. F. Morcom.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States in and for the Northern District of Illinois.

HETTY H. R. GREEN } In Chancery. Bill for Foreclosure.
vs.
SARAH H. GAGE *et al.* }

I hereby enter my appearance in the above-entitled cause.

G. F. MORCOM.

Feb. 12th, 1876.

(Endorsed:) Filed March 6, 1876. Wm. H. Bradley, clerk.

134 *Answer of Geo. W. Gage, Jr., David A. Gage, Minors, by Guardian ad Litem.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

The joint & several answer of George W. Gage, Jr., and David A. Gage, minors, defendants, by their guardian *ad litem*, E. H. Beebe, to the bill of complaint of Hetty H. R. Green, complainant, against them and others.

These defendants, now & at all times saving & reserving to themselves all benefit & advantage of exception to said bill of complaint, for answer thereto say:

That they are minors, under the age of twenty-one years, and know nothing of the various matters in said bill set forth, and therefore require that the same may be proved by the said complainant, and that their interests in the matters in controversy in this suit may be protected by this hon. court.

And they pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

GEORGE W. GAGE, JR.,
DAVID A. GAGE,
By E. H. BEEBE,
Their Guardian ad Litem & Sol'r.

(Endorsed:) Filed March 31, 1876. Wm. H. Bradley, clerk.

135 *Answer of Charles Tobey.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

HETTY H. R. GREEN, Complainant, } Nos. 13072, 760. Bill for Foreclosure.
vs.
SARAH H. GAGE *et al.*, Defendants. }

The several answer of Charles Tobey, one of the defendants named in the said complainant's said bill of complaint.

This defendant, saving and reserving unto himself all manner of benefit of exception to the said complainant's said bill of complaint, for answer thereunto or to the material parts thereof, answering, says:

That he is informed and believes that said George W. Gage and Sarah H., his wife, did, about May 7th, 1873, execute and deliver to Benjamin E. Gallup, as trustee, a certain deed of trust, conveying the premises in said complainant's bill first described, but whether the said deed is correctly set out in said bill or was given to secure the indebtedness alleged in said bill or not, or whether default in the conditions of said deed has taken place or not, this defendant
136 is not informed, save by said bill, and therefore he demands proof of all the allegations in those regards in said bill contained.

That he is informed and believes that said George W. Gage and Sarah H., his wife, did, on or about July 28th, 1871, execute and deliver to Julius White, as trustee, a certain trust deed conveying the premises in said bill secondly described, but whether the terms and conditions of said deed are correctly described in said bill or not, or whether defaults have been made in the terms and conditions of said deed as alleged in said bill, or whether said deed was given to secure the indebtedness alleged in said bill or not, or whether said complainant is the owner or legal holder of said indebtedness or not, this defendant has no knowledge, information, or belief save by the allegations of said bill, and therefore he calls for proof of said allegations.

And this defendant, further answering, says that on the 19th day of December, 1873, the said George W. Gage and the said defendant, John A. Rice, were indebted to the Thayer and Tobey Company, a corporation duly organized under the laws of the State of Illinois, in the sum of $43,791.92 for goods, wares, and merchandise theretofore sold and delivered to said Gage and Rice; that on said day said Gage & Rice, to evidence and secure the payment of said indebtedness, executed and delivered to said company their four joint promissory notes of that date in the sum of $10,947.98 each, two of them payable on or before December 19th, 1874, and the other two payable on or before December 19th, 1875, and all bearing interest at the rate of 10 per cent. per annum, payable semi-annually.
137 That on said last-named day, in order further to secure the payment of said notes, said George W. Gage and Sarah H., his wife, executed and delivered to the defendant John N. Jewett their trust deed conveying to said Jewett the premises in said bill first described, upon certain trusts and conditions therein named; that said deed was duly acknowledged about January 9th, 1874, and recorded in the recorder's office of Cook county, Illinois, in Book 347, at page 424; that the said notes are all past due, but in no part paid, either principal or interest, and that on or about December 1st, 1874, the said company, for a good and valuable consideration, assigned and transferred by endorsement all of said notes to this defendant, and this defendant ever since has been and now is the owner and legal holder thereof.

And this defendant, further answering, admits the death of said George W. Gage as alleged in said bill, and states upon information and belief that his estate is wholly insolvent, and that said John A.

Rice is also insolvent; that the property described in the said trust deed to said Jewett is the only security for its payment of said notes, and that unless payment can be realized from said security the whole amount of said notes will be lost to this defendant.

And this defendant, further answering, insists that if the said complainant shall upon the hearing of this cause sustain the allegations of her said bill and show herself entitled to have a sale of the premises described in said trust deed to said Gallup, and also of the premises described in the said trust deed to said White, then and in that case in equity its premises embraced in the said trust deed to the said White and not embraced in the said trust deed to
138 said Jewett should be first resorted to for satisfaction of the indebtedness which may be found to be secured by said trust deed to said White, and, further, that all and singular the premises embraced in the said trust deed to said Gallup, the trust deed to said White, and the trust deed to said Jewett should, if practicable, be sold in separate lots and in the smallest legal subdivisions, so that this defendant may have an opportunity to protect the security of the said notes; and this defendant further shows that if the said premises should be sold "in masse" the security of the said notes would be wholly lost, for the reason that, as this defendant believes, the said complainant would bid the entire amount of her claim thereupon and no person or persons could be found who would bid more.

And this defendant, further answering, says that he is ready to produce the said trust deed to said Jewett and the said notes held by him in court and prays leave to refer to the same for greater certainty in regard to certain allegations of this his answer; and this defendant, having fully answered the said bill, prays to — hence dismissed with his costs, &c.

CHARLES TOBEY,
By JEWETT & ADAMS,
His Sol'rs.

J. N. JEWETT,
CHAS. T. ADAMS,
Of Counsel.

(Endorsed:) Filed March 31st, 1876. Wm. H. Bradley, clerk.

139 FRIDAY, *March* 31, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE, Ex'x, &c., *et al.* } In Chancery.

On motion of complainant's solicitors, it is ordered by the court that the bill herein be dismissed as to the defendants Donald Bremner and Charles D. Weldon.

And, on motion, leave is given complainant to amend her bill of complaint herein by making Charles Tobey a party defendant, who files his answer herein.

And, on motion, E. H. Beebe, Esq., is appointed guardian *ad litem* of the infant defendants, George W. Gage, Jr., and David A. Gage, herein.

140 WEDNESDAY, *April* 5, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE, EVA GAGE, MARY B. GAGE, CARRIE E. G. GAGE, Alice Gage, George W. Gage, Jr., David A. Gage, William F. Tucker, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, David A. Gage, John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, The Tobey Furniture Company, Julius White, Jonathan Goodwin, Jr., The Mechanics' National Bank of Chicago, The Illinois Trust and Savings Bank, Moore C. White, Charles H. Gaubert, James E. Gross, The Chicago File Company, Charles M. Smith, Monroe Heath, William F. Milligan, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenly, George R. Jenkins, Charles F. Swift, Crane Bros. Manufacturing Company, August Shiffer, The
141 First National Bank of Sioux City, and Charles Tobey.

Now comes the complainant, by George F. Bailey, her solicitor, and it appearing to the court that the defendants Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, The Mechanics' National Bank of Chicago, William Coffin, Charles A. Mather, George F. Morcom, Charles Tobey, and The First National Bank of Sioux City have each in person, or by attorney duly authorized thereto, entered their appearance in this cause, and that said absent defendant, John A. Rice, was duly and personally served on the twenty-seventh day of January, A. D. 1876, at Philadelphia, in the State of Pennsylvania, with a certified copy of the order heretofore, on the twenty-first day of January, A. D. 1876, entered in this cause, requiring the said John A. Rice to appear, plead, answer, or demur to the complainant's bill of complaint in this cause by the first day of March, A. D. 1876;

And that due and legal personal service has been had upon all the other and remaining defendants in this cause by service of subpœna in this cause upon them respectively, and that each and all the defendants in this cause are now legally before this court and subject to its jurisdiction, and that neither of said defendants have pleaded, answered, or demurred therein, excepting the following-

named defendants: George W. Gage, Jr., and David A. Gage,
142 children of said George W. Gage, deceased, who have answered by their guardian *ad litem*, heretofore duly appointed by this court; John N. Jewett, Charles T. Adams, The Tobey Furniture Company, Monroe Heath, and William F. Milligan and Charles Tobey, on motion of complainant's solicitor, it is ordered that each and all of said defendants who have not pleaded, answered, or demurred as aforesaid, namely, Sarah H. Gage, Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, William F. Tucker, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, David A. Gage, John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, Julius White, Jonathan Goodwin, Jr., the Mechanics' National Bank of Chicago, the Illinois Trust and Savings bank, Moore C. White, Charles H. Gaubert, James E. Gross, the Chicago File Company, Charles M. Smith, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenly, George R. Jenkins, Charles F. Swift, Crane Bros. Manufacturing Company, August Shiffer, the First National Bank of Sioux City, do plead, answer, or demur to the bill of complaint in this cause instanter; and said last-named defendants, having each been three times called so to do, come not, but make default, and it is hereby ordered, adjudged, and decreed that
143 as to each of said defendants last named and so making default as aforesaid said bill of complaint and the matters and things therein contained be taken as and for confessed.

It is further ordered, adjudged, and decreed that this cause be referred to Henry W. Bishop, master in chancery of this court, to take proofs herein and report the same to this court, together with the amount due the complainant upon the notes, bond, and trust deeds in said bill mentioned, and the covenants therein contained and causes of complaint in said bill of complaint set forth.

143–1 *Master's Report.*

In the Circuit Court of the United States for the Northern District of Illinois.

HETTY H. R. GREEN, Complainant,
vs.
SARAH H. GAGE, Widow of the Late George W. Gage, Deceased, and Executrix of His Last Will and Testament; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, Children of the said George W. Gage, Deceased; William F. Tucker, Joseph K. Barry, and John W. Clapp, Guardians of said Minor Children; Lewis L. Coburn, David A. Gage, and John A. Rice, Benjamin E. Gallup, Francis B. Peabody and George L. Paddock, John N. Jewett and Charles T. Adams, The Tobey Furniture Company, Julius White and Jonathan Goodwin, Jr., The Mechanics' National Bank of Chicago, The Illinois Trust & Savings Bank, Moore C. White, Charles H. Gaubert and James E. Gross, The Chicago File Company, Charles M. Smith, The President
143–2 of said Chicago File Company, Monroe Heath, William F. Milligan, Charles Tobey, Bradford Hancock, William Coffin, Alexander S. Maltmann, George F. Morcom, Clark Lipe, John B. Adams, David Kenley, George R. Jenkins, Charles F. Swift, Crane Brothers Manufacturing Company, August Schiffer, The First National Bank of Sioux City, Defendants.

13072, 760. In Chancery.

Master's report.

To the honorable the judges of said court:

The above-entitled cause having been referred to me as master in chancery of said court by an order of said court heretofore entered herein, to wit, on the fifth (5th) day of April, A. D. 1876, I do hereby report that, having given notice to the parties interested that a hearing for the purposes in the said order expressed would be had before me at my office, No. 25 Republic Life building, La Salle street, Chicago, on Wednesday, the twelfth (12th) day of April, A. D. 1876, at two (2) o'clock in the afternoon, I was attended on the said last-mentioned day by George F. Bailey, Esquire, of counsel for the said complainant, who produced in evidence before me all the papers filed herein, including the bill of complaint; also a principal promissory note dated May 7th, 1873, signed "Geo. W. Gage, D. A.

Gage, John A. Rice," & payable as therein mentioned, and
143–3 four (4) interest coupon notes thereto attached, each of said notes being dated May 7th, 1873, and signed "Geo. W. Gage, D. A. Gage, John A. Rice," and payable as therein mentioned, and a deed of trust dated the seventh (7th) day of May, A. D. 1873, between George W. Gage and Sarah H. Gage, his wife, party of the first part, & Benjamin E. Gallup, party of the second part, and a deed of trust dated the 22nd day of July, A. D. 1871, between George W. Gage and Sarah H., his wife, party of the first part, and Julius White, party of the second part, and a bond dated the twenty-second day of July, A. D. 1871, from George W. Gage unto The Travelers' Insurance Company, for securing payment of the sum of fifty thousand dollars ($50,000), with interest thereon as therein mentioned, and two (2) interest coupons thereto attached, each of said notes being for a half year's interest on the said principal sum of $50,000, & payable as therein mentioned (being the principal and interest notes, deeds of trust, and bond set out and described in the said bill of complaint).

I was also attended on the said twelfth (12th) day of April, A. D. 1876, by R. W. Hyman, Jr., Lewis L. Coburn, W. O. Van Every, who testified as witnesses on behalf of said complainant & whose testimony was duly taken, is hereto attached and made a part hereof. I was also attended on said 12th day of April, A. D. 1876, by L. S. Swezey, Esquire, of the firm of Bonfield, Swezey & Smith, who appeared as counsel for Heath and Milligan, defendants herein, & also by E. H. Beebe, Esquire, guardian *ad litem* for George W. Gage & David A.
Gage. The taking of further testimony herein was then
143–4 adjourned to Thursday, the 13th day of April, A. D. 1876, on which occasion I was again attended by said counsel for complainant and defendants Heath & Milligan, and also by John Neale and Henry J. Milligan, who testified as witnesses on behalf of said Heath and Milligan and whose testimony was duly taken, is hereto annexed and made a part hereof. I further report that from an examination of the said bill of complaint, principal & interest notes, deeds of trust, bond, and testimony so produced and taken as aforesaid, and from a computation of the said principal and interest notes and bond I find that there is due and owing to the said complainant, Hetty H. R. Green, on the principal & interest notes dated May 7th, 1873, secured by deed of trust of even date with said notes, the sum of one hundred thousand dollars ($100,000) for the principal and twenty thousand seven hundred and one dollars and thirty-one cents ($20,701.31) for interest thereon, and on the unpaid interest coupons to the date of this report; and also that there is due and owing to the said complainant on the bond dated the 22nd day of July, A. D. 1871, and interest coupons attached, secured by deed of trust of even date with said bond, the sum of fifty thousand dollars ($50,000) for the principal and eight thousand one hundred and eighty-seven dollars and fifty cents ($8,187.50) for interest thereon, and on the unpaid interest coupons to the date of this report. I further report that from the testimony of the said R. W. Hyman, Jr., it appears there

is due and owing to the said complainant for payments which
143–5 have been made for taxes which had become due and unpaid, and to redeem from sales for taxes on the property mentioned in the bill of complaint and deeds of trust herein, the total sum of seven thousand & four hun dred dollars & fifty-six cents ($7,400.56), and the fu-ther sum of one hundred and seventy-two dollars & sixty-eight cents ($172.68) for interest thereon, at the rate of ten per cent., from the time of such payment to the date of this report, under the covenants contained in said deeds of trust; and I further report that from the testimony of the said W. O. Van Every it appears there is due and owing to the said complainant for payments which have been made for premiums for insurance on the buildings on the premises described in said bill of complaint and deed of trust of the 7th day of May, A. D. 1873, the sum of one hundred dollars ($100), and the further sum of four dollars & three cents ($4.03) for interest thereon to the date of this report, under the covenants contained in the said deed of trust, making a total sum due and owing to the said complainant for principal and arrears of interest thereon to the date of this report on said principal & interest coupon notes, bond & interest coupon notes secured by deeds of trust, and for payments for taxes and to redeem from sales for taxes and interest thereon to the date of this report, and for payment for premium on insurance and interest thereon to the date of this report of one hundred and eighty-six thousand five hundred and sixty-six dollars and eight cents ($186,566.08). I further report that from the testi-
143–6 mony of said Lewis L. Coburn it appears that there are two minor children of the late George W. Gage him surviving, and that they are named respectively George W. Gage, Jr., and David A. Gage.

I return all the papers and documents used by me in the preparation of this report.

All of which is respectfully submitted.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, April 13th, A. D. 1876.

* * * * * * *

(Endorsed:) Filed April 20, 1876. Wm. H. Bradley, clerk.

144 THURSDAY, *April* 20, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE *et al.* } In Chancery.

On motion, it is ordered by the court that the report of Henry W. Bishop, Esq., master in chancery of this court, of the amount due the complainant herein be confirmed unless cause be shown to the contrary by the first Monday of June next.

145 SATURDAY, *May* 27, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE, Ex'r, &c., *et al.* } In Chancery.

On motion, leave is given the Powell Roofing Company to file petition and be made party defendant and to answer and file a cross-bill herein.

146 *Petition of Powell Roofing Company.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois, May Term, A. D. 1876.

HETTY H. R. GREEN
vs.
SARAH H. GAGE *et al.* } Foreclosure.

To the honorable the judge of said court, in chancery sitting:

The petition of Powell Roofing Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and located at the city of Chicago, in the county of Cook, in said State, respectfully represents that your petitioner has a good and valid lien, under the mechanics' lien laws of the said State of Illinois, upon that part or portion of the premises mentioned in the bill of complaint in the above-entitled suit, described as follows, to wit:

All that piece or parcel of land situate in the city of Chicago, in the county of Cook and State of Illinois, being lot numbered five (5), in block numbered thirteen (13), in fractional section fifteen (15), addition to Chicago, reference being had to the plat of
147 said addition recorded in the recorder's office of said county of Cook, in Book "H" of Maps, at page 230, and in new volume "H" of Maps, at page 83, said lot fronting east on Michigan avenue, between Harrison street and Hubbard court, with a width of eighty (80) feet, and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet, to a sixteen (16) foot alley, together with the three story and basement brick dwelling-house trimmed with stone standing on said lot and all other buildings and improvements standing thereon.

That your petitioner's said lien is for work and labor done by your petitioner for and at the request of the owner in fee of said premises above described, and for materials necessary for said work and labor furnished by your petitioner to and at the like request of said owner, said work and labor being done to and upon the buildings standing on said lot, and consisting of roofing and repairing of roofs upon

said building; that the price agreed to be paid to your petitioner by said owner for said work and labor and materials was the sum of one hundred and four $\frac{48}{100}$ dollars, no part of which has been paid; that on the 20th day of March, A. D. 1876, and within six months after the last of said work and labor was done and the last of said materials furnished as aforesaid, your petitioner duly filed, as required by and pursuant to the statute of said State in such case made and provided, its petition in the superior court of said county of Cook to enforce its aforesaid lien upon the premises above described; and your petitioner shows and claims that by virtue of the matters and things aforesaid it has a good and valid lien
148 under the mechanics' lien laws of said State upon the premises above described to the amount of one hundred and four $\frac{48}{100}$ dollars, with interest thereon, at the rate of six per centum per annum, from the 20th day of September, A. D. 1875.

That the above-entitled suit is brought to foreclose a certain trust deed made before your petitioner so acquired its said lien, and your petitioner has not been made a party defendant to said suit.

That in order to protect your petitioner's said lien it is necessary that it should be made a party defendant to said suit.

Your petitioner therefore pays that it may be made a party defendant to the above-entitled suit and be authorized to appear and answer in said suit and take such steps therein as may be necessary to protect and enforce its said bill, and that it may have such other or further order or relief in the premises as shall be just; and your petitioner will ever pray, &c.

Dated Chicago, May 10, A. D. 1876.

POWELL ROOFING CO.,
By E. L. H. GARDINER, *President.*

GEO. LAWRIE,
Sol'r for Def't.
E. L. H. GARDINER.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Ezra L. H. Gardiner, being duly sworn, dep-ses and says that he is the president of the Powell Roofing Company, the peti-
149 tioner named in the foregoing petition; that he has read said petition, knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

E. L. H. GARDINER.

Subscribed and sworn to before me this 13 day of May, A. D. 1876.

A. E. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed May 27, 1876. Wm. H. Bradley, clerk.

150 THURSDAY, *June* 1, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE, Ex'r, &c., *et al.* } In Chancery.

Now come the parties, by their solicitors, and now come on to be heard the exceptions of Heath & Milligan to the master's report herein, and after hearing the same, the court, not being now sufficiently advised in the premises, takes time to consider.

151 SATURDAY, *June* 3, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE *et al.* } In Chancery.

The court having considered and being now fully advised upon the exceptions of the defendants Heath and Milligan to the report of Henry W. Bishop, Esq., master in chancery of this court, overrules the same, and on motion of complainant's solicitor it is ordered by the court that the order heretofore entered herein allowing the Powell Roofing Company to file its petition and intervene and file cross-bill herein be set aside, the solicitors of said company being present and having been heard on said motion.

152 MONDAY, *July* 31, 1876.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE, EVA GAGE, MARY B. GAGE, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., David A. Gage, William F. Tucker, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, David A. Gage, John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, The Tobey Furniture Company, Julius White, Jonathan Goodwin, Jr., The Mechanics' National Bank of Chicago, The Illinois Trust and Savings Bank, Moore C. White, Charles H. Gaubert, James E. Gross, The Chicago File Company, Charles M. Smith, Monroe Heath, William F. Milligan, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenly, George R. Jenkins, Charles F. Swift, Crane Bros.
153 Manufacturing Company, August Shiffer, The First National Bank of Sioux City, and Charles Tobey. } In Chancery.

This cause having this day been brought on to be heard upon the bill of complaint filed herein, taken as confessed by all the defendants excepting the said George W. Gage, Jr., and David A. Gage, children of said George W. Gage, deceased; John N. Jewett, Charles T. Adams, The Tobey Furniture Company, sued by the name of the Thayer and Tobey Furniture Company; Monroe Heath, William F. Milligan, and Charles Tobey, and upon the answers of said last-named defendants and the several replications thereto respectively, filed herein March thirty-first, A. D. 1876, and upon all the pleadings and proofs in this cause, and upon the report of Henry W. Bishop, master in chancery of this court, which report bears date the thirteenth day of April, A. D. 1876, and was made in pursuance of an order of this court heretofore, on the fifth day of April, A. D. 1876, made in this cause, referring the same to the said master to take proofs therein and report the same to this court, together with the amount due the complainant upon the notes, bond, trust deeds, and the covenants therein contained and causes of complaint in said bill contained, which report was filed herein on the twentieth day of April, A. D. 1876, and said minor defendants, George W. Gage, Jr., and David A. Gage, being represented here in court by E. H. Beebe, their guardian *ad litem*; the said defendants,
154 John N. Jewett, Charles T. Adams, The Tobey Furniture Company, and Charles Tobey, by their solicitors, Mess. Jewett & Adams; the defendants Munroe Heath and William F. Milligan, by their solicitors, Messrs. Bonfield, Swezey & Smith, and the ex-

ceptions on behalf of said Heath and Milligan to said report heretofore filed having been on the third day of June, A. D. 1876, overruled: on reading said report and the exhibits and proofs therewith filed herein, upon motion of George F. Bailey, of counsel for complainant, no cause to the contrary having been shown, it is ordered, adjudged, and decreed, and this court, by virtue of the authority in it vested, doth order, adjudge, and decree, that the said report and all things therein contained do stand ratified and confirmed.

And this court, being fully advised in the premises, doth find and adjudge that all the material allegations in the said bill of complaint contained have been fully proved, and that there is due to the complainant in this cause, upon the causes of complaint set forth in said bill of complaint, the sum of one hundred and eighty-six thousand five hundred and sixty-six dollars and eight cents ($186,566.08), as stated in said master's report, together with interest thereon from the thirteenth day of April, A. D. 1876, the date of said report, as follows: One hundred and twenty-seven thousand eight hundred
155 and thirty-one dollars and seventy-one cents ($127,831.71) upon said indebtedness secured by said trust deed mentioned in said bill of complaint and filed with said report, from George W. Gage and wife to Benjamin E. Gallup, dated May seventh, A. D. 1873, including taxes and insurance upon the property therein described, and fifty-eight thousand seven hundred and thirty-four dollars and thirty-seven cents ($58,734.37) upon said indebtedness secured by said trust deed mentioned in said bill of complaint and filed with said report, from said George W. Gage and wife to Julius White, dated July twenty-second, A. D. 1871, including taxes upon property described in said last-mentioned trust deed. It is therefore, upon motion of counsel for complainant, ordered, adjudged, and decreed, and this court doth order, adjudge, and decree, that said defendants or some of them pay or cause to be paid to the complainants, within one hundred days from the date of the entry of this decree, said sums of one hundred and twenty-seven thousand eight hundred and thirty-one dollars and seventy-one cents ($127,831.71) and fifty-eight thousand seven hundred and thirty-four dollars and thirty-seven cents ($58,734.37) so found due the complainant as aforesaid, with interest thereon, at the rate of six per cent. per annum, from said thirteenth day of April, A. D. 1876, the date of said master's
156 report, to the day of such payment, and that in default of such payment as aforesaid, with interest thereon as aforesaid, of said sum of fifty-eight thousand seven hundred and thirty-four dollars and thirty-seven cents ($58,734.37), the premises mentioned and described in said trust deed from said George W. Gage and wife to Julius White, or so much thereof as may be sufficient to satisfy the amount last aforesaid mentioned, together with interest thereon as aforesaid, and one-half of the costs in this cause, be sold at public auction by or under the direction of Henry W. Bishop, master in chancery of this court; and that in default of such payment as aforesaid, with interest thereon as aforesaid, of said sum of one hundred and twenty-seven thousand eight hundred and thirty-one dollars and seventy-one cents ($127,831.71), the premises mentioned and described

in said trust deed from said George W. Gage and wife to Benjamin E. Gallup, or so much thereof as may be sufficient to satisfy the amount last aforesaid mentioned, together with interest thereon as aforesaid, and one-half of the costs in this cause, be sold at public auction by or under the direction of Henry W. Bishop, master in chancery of this court, and that said master make such sales in accordance with the course and practice of this court, and that at such sales the complainant or any of the parties to this cause may become the purchaser.

157 The premises authorized to be sold under and by virtue of this decree are the following, to wit: All those certain lots, pieces, or parcels of land situate, lying, and being in the county of Cook, in the State of Illinois, known and described as follows, to wit: Lot numbered five (5), in block numbered thirteen (13), in fractional section fifteen (15), addition to Chicago, reference being had to the plat of said addition, which was recorded in the recorder's office of said Cook county, in Book H of Maps, at page 230, new volume H, page 83, said lot fronting east on Michigan avenue, between Harrison street and Hubbard court, with a width of eighty (80) feet, and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet, to a sixteen (16) foot alley, together with the three-story and basement brick dwelling-house, trimmed with stone, standing on said lot, and all other improvements thereon;

Also lots numbered one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block numbered three, in Egandale, which said Egandale is a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter of section eleven (11), in township thirty-eight (38) north, of range fourteen (14) east, of the third principal meridian, reference being had to the plat of said Egandale, which was filed for

158 record in the recorder's office of said Cook county on June 12, 1868; also the south half ($\frac{1}{2}$) of section thirteen (13), and the south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirteen (13), and the east half ($\frac{1}{2}$) of the northeast quarter of section numbered twenty-four (24), all in township thirty-eight (38) north, of range thirteen (13) east, of the third principal meridian (the property conveyed by the trust deed from George W. Gage and wife to Benjamin E. Gallup is all that above described excepting the east half of the northeast quarter of section twenty-four, township thirty-eight north, range thirteen east, of the third principal meridian; that covered by the trust deed from George W. Gage and wife to Julius White is only that in sections thirteen and thirty-four aforesaid), together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

It is further ordered that if the said premises or any parcel thereof shall at such sales be struck off and sold by the master to the complainant in this cause, the complainant shall be required to pay to the master only so much of the complainant's bid as shall, taken together with other moneys paid to the master at such sale on bids for parcels by other persons, if any there be, be suffi-

cient to satisfy the expenses of the sale and the master's fees, disbursements, and expenses and the costs of this suit, and also any
159 excess of the remainder of the amount of said bid after such payment over the amount due the complainant under this decree for indebtedness secured by said mortgage.

It is further ordered that said master make report to this court of such sales and of his acts and doings hereunder for approval and confirmation and for further direction herein, and that he retain from the moneys received by him on said sales the amount of his fees, disbursements, and commissions thereon, and bring the residue of such moneys, if any, into court to abide the further order of the court, and that he take the receipt of the clerk of this court therefor and file the same with said report, and if the price for which said premises shall be so sold shall be insufficient to satisfy the amount so found and adjudged to be due to the complainant, with the interest and the costs of suit and expenses of sale as aforesaid, that the master specify the amount of such deficiency in his report of sale.

And it is further ordered that the clerk of this court hold such moneys so to be paid him by said master subject to the further order and direction of this court in this cause.

159½ *Master's Report of Sale.*

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

HETTY H. R. GREEN, Complainant,
vs.
SARAH H. GAGE, EVA GAGE, MARY B. GAGE, CARRIE E. S. GAGE, Alice Gage, George W. Gage, Jr., David A. Gage, William F. Tucker, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, David A. Gage, John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, The Tobey Furniture Company, Julius White, Jonathan Goodwin, Jr., The Mechanics' National Bank of Chicago, The Illinois Trust and Savings Bank, Moore E. White, Charles H. Gaubert, James E. Gross, The Chicago File Company, Charles M. Smith, Monroe Heath, William F. Milligan, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenly, George R. Jenkins, Charles F. Swift, Crane Brothers Manufacturing Company, August Schiffer, The First National Bank of Sioux City, and Charles Tobey, Defendants.

160 Master's report of sale.

To the honorable the judges of the said court:

The undersigned, Henry W. Bishop, as master in chancery of said court, respectfully reports that it was in a decree of the said court entered in the above-entitled cause on the 31st day of July, A. D.

1876, among other things, ordered, adjudged, and decreed that the said defendants or some of them pay or cause to be paid to the complainant within one hundred days from the date of the entry of the said decree the sums of one hundred and twenty-seven thousand eight hundred and thirty-one dollars and seventy-one cents ($127,831.71) and fifty-eight thousand seven hundred and thirty-four dollars and thirty-seven cents ($58,734.37) so found due the complainant as therein aforesaid, with interest thereon at the rate of six per cent. per annum from the 13th day of April, A. D. 1876, the date of said master's report, to the day of such payment, and that in default of such payment as aforesaid, with interest thereon as aforesaid, of said sum of fifty-eight thousand seven hundred and thirty-four dollars and thirty-seven cents ($58,734.37), the premises mentioned and described in the trust deed from said George W. Gage and wife to Julius White, or so much thereof as might be sufficient to satisfy the amount last aforesaid mentioned, together with interest thereon as aforesaid and one-half of the costs in this cause, be sold at public auction by or under the direction of Henry W. Bishop, master in chancery of this court, and that in default of such payment as aforesaid, with interest thereon as aforesaid, of the sum
161 of one hundred and twenty-seven thousand eight hundred and thirty-one dollars and seventy-one cents ($127,831.71), the premises mentioned and described in the trust deed from said George W. Gage and wife to Benjamin E. Gallup, or so much thereof as might be sufficient to satisfy the amount last aforesaid mentioned, together with interest thereon as aforesaid and one-half of the costs in this cause, be sold at public auction by or under the direction of Henry W. Bishop, master in chancery of this court, and that said master make such sales in accordance with the course and practice of this court, and that at such sales the complainant or any of the parties to this cause might become the purchaser.

It was further ordered that if the said premises or any parcel thereof should at such sale be struck off and sold by the master to the complainant in this cause, the complainant should be required to pay to the master only so much of the complainant's bid as should, taken together with other moneys paid to the master at such sale on bids for parcels by other persons, if any there be, be sufficient to satisfy the expenses of the sale and the master's fees, disbursements and expenses, and the costs of this suit, and also any excess of the remainder of the amount of said bid after such payment over the amount due the complainant under the said decree for indebtedness secured by said mortgage.

It was further ordered that said master make report to this court of such sale and of his acts and doings thereunder for approval and confirmation and for further direction herein, and that he retain from the moneys received by him on said sales the amount of his fees, disbursements, and commissions thereon and bring the residue
of such moneys, if any, into court to abide the further order
162 of the said court, and that he take the receipt of the clerk of this court therefor and file the same with said report, and if the price for which said premises should be so sold should be insuffi-

cient to satisfy the amount so found and adjudged to be due to the complainant, with the interest and the costs of suit and expenses of sale as aforesaid, that the master specify the amount of such deficiency in his report of sale.

That in accordance with the said decree on the said court the undersigned, as such master in chancery, advertised the said premises and property for sale at public auction to the highest bidder for cash in hand in the Inter Ocean, a daily newspaper of general circulation, printed and published in the city of Chicago, county of Cook, and State of Illinois, the date of the first paper containing the said advertisement being the 11th day of November, A. D. 1876, and the date of the last paper containing the same being the 6th day of December, A. D. 1876, the same having been inserted for more than twenty days, to wit, twente-two days, exclusive of Sundays, previous to said day of sale, as appears by a certified copy of said advertisement and certificate of publication hereto attached and made a part hereof.

That at the hour, day, and place fixed and mentioned in the said advertisement, to wit, at the hour of ten (10) o'clock, in the forenoon of the 7th day of December, A. D. 1876, at the front door of the Republic Life building, on La Salle street, numbers 157 to 163 La Salle street, Chicago, Cook county, Illinois, the undersigned, as such master in chancery, did offer the premises and property in the said advertisement and decree mentioned and described as all
163 those certain lots, pieces, or parcels of land situate, lying, and being in the county of Cook, in the State of Illinois, known and described as follows, to wit: Lot numbered five (5), in block numbered thirteen (13), in fractional section fifteen (15), addition to Chicago, reference being had to the plat of said addition, which was recorded in the recorder's office of said Cook county in Book H of Maps, at page 230, new volume H, page 83, said lot fronting east on Michigan avenue, between Harrison street and Hubbard court, with a width of eighty (80) feet, and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet, to a sixteen (16) foot alley, together with the three-story and basement brick dwelling-house, trimmed with stone, standing on said lot, and all other improvements thereon; also lots numbered one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block numbered three (3), in Egandale, which said Egandale is a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter of section eleven (11), in township thirty-eight (38) north, of range fourteen (14) east, of the third principal meridian, reference being had to the plat of said Egandale, which was filed for record in the recorder's office of said Cook county on June twelve, A. D. 1868;

Also the south half ($\frac{1}{2}$) of section thirteen (13) and the south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirteen (13) and the east half ($\frac{1}{2}$) of the northeast quarter of section numbered twenty-four (24), all in township thirty-eight (38) north, of range thirteen (13) east, of the third principal meridian,

164 together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, for sale, at public auction, to the highest and best bidder for cash in hand, and in the following manner, to wit: The undersigned first offered for sale the south ten (10) acres of the east half of the northeast quarter of section twenty-four (24), township thirty-eight (38) north, range thirteen (13) east, of the third principal meridian, smaller quantities if desired, and no one bid for the same, offered in that way. The undersigned then offered for sale the said ten acres together, and then and there struck off and sold the same for the sum of thirty-six hundred and fifty-one dollars and thirty-two cents ($3,651.32) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the north seventy (70) acres of the east half of the northeast quarter of section twenty-four (24), township thirty-eight (38) north, of range thirteen (13) east (being the remainder of the east half of the northeast quarter of said last-mentioned section), in lots separately, as shown in a subdivision entitled Gaubert and Gross' addition to South Lynne, recorded August 2nd, 1873, and no one bid for the same, offered in that way. The undersigned then offered the same in blocks of said subdivision separately and in the following manner, to wit: The undersigned then offered for sale block one (1), and then and there struck off and sold the same for the sum of twenty-five hundred dollars ($2,500) to said complainant, who bid for the same by said R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then

165 offered for sale blocks two (2), three (3), four (4), five (5), six (6), and seven (7) in separate blocks, and then and there struck off and sold the said blocks separately for the sum of sixteen hundred and sixty-six dollars and sixty-six cents ($1,666.66) for each block to the said complainant, who bid for each of said blocks by said R. W. Hyman, Jr., her agent, the said sum being the highest and best sum bid for each of said blocks and she being the highest and best bidder therefor. The undersigned then offered for sale blocks eight (8) and nine (9) in separate blocks, and then and there struck off and sold the said blocks separately for the sum of twenty-five hundred dollars ($2,500) for each block to the said complainant, who bid for each of said blocks by R. W. Hyman, Jr., her agent, the said sum being the highest and best sum bid for each of said blocks and she being the highest and best bidder therefor. The undersigned then offered for sale blocks ten (10), eleven (11), and twelve (12) in separate blocks, and then and there struck off and sold the said blocks separately for the sum of sixteen hundred and sixty-six dollars and sixty-six cents ($1,666.66) for each block to the said complainant, who bid for each of said blocks by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for each of said blocks and she being the highest and best bidder therefor. The undersigned then offered for sale blocks thirteen (13) and fourteen (14) in separate blocks, and then

and there struck off and sold the same blocks separately for the sum of eight hundred and thirty-three dollars and thirty-three cents ($833.33) for each block to the said complainant, who bid for each of said blocks by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for each of said blocks and she being the highest and best bidder therefor. The undersigned then offered for sale blocks fifteen (15) and sixteen (16) in separate blocks, and then and there struck off and sold the said blocks separately for the sum of eight hundred and thirty-three dollars and forty cents ($833.40) for said block fifteen (15) and twelve hundred and fifty dollars ($1,250) for said block sixteen (16) to the complainant, who bid for each of said blocks by R. W. Hyman, Jr., her agent, the said sums being the highest and best sums bid for the said respective blocks and she being the highest and best bidder therefor. The undersigned then offered for sale the southwest quarter of the southwest quarter of section thirteen (13), township thirty-eight (38) north, of range thirteen (13) east, of the third principal meridian, in any less quantities if desired, and no one responding, the undersigned then offered for sale the said southwest quarter of said southwest quarter of said section thirteen (13), and then and there struck off and sold the same for the sum of twelve thousand dollars ($12,000) to said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the southeast quarter of the southwest quarter of the said section thirteen (13) in any less quantities if desired, and no one responding, the undersigned then offered for sale the said southeast quarter of said southwest quarter of said section thirteen (13), and then and there struck off and sold the same for the sum of eight thousand dollars ($8,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the northwest quarter of the southwest quarter of said section thirteen (13) in less quantities if desired, and no one responding, the undersigned then offered for sale the said northwest quarter of the southwest quarter of said section thirteen (13), and then and there struck off and sold the same for the sum of twelve thousand dollars ($12,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the northeast quarter of the said southwest quarter of said section thirteen (13) in less quantities if desired, and no one responding, the undersigned then offered for sale the said northeast quarter of the said southwest quarter of said section thirteen (13), and then and there struck off and sold the same for the sum of eight thousand dollars ($8,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The un-

166

167

dersigned then offered for sale the southeast quarter of the southeast quarter of said section thirteen (13) in less quantities if desired, and no one responding, the undersigned then offered for sale the said southeast quarter of said southeast quarter of said section thirteen (13), and then and there struck off and sold the same for the sum of seventeen thousand dollars ($17,000) to said complainant, who bid for same by R. W. Hyman, Jr., her agent, that sum being the
168 highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the southwest quarter of the said southeast quarter of said section thirteen (13) in less quantities if desired, and no one responding, the undersigned then offered for sale the said southwest quarter of the said southeast quarter of said section thirteen (13), and then and there struck off and sold the same for the sum of nine thousand dollars ($9,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the northeast quarter of the said southeast quarter of the said section thirteen (13) in any less quantities if desired, and no one responding, the undersigned then offered for sale the said northeast quarter of the said southeast quarter of the said section thirteen (13), and then and there struck off and sold the same for the sum of seventeen thousand dollars ($17,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the northwest quarter of the said southeast quarter of said section thirteen (13) in any less quantities if desired, and no one responding, the undersigned then offered for sale the said northwest quarter of the said southeast quarter of the said section thirteen (13), and then and there struck off and sold the same for the sum of nine thousand dollars ($9,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest
169 and best bidder therefor. The undersigned then offered to sell the south fifty (50) acres of the east half of the northeast quarter of the said section thirteen (13) in any way that might be desired, and no one responding, the undersigned then offered for sale the said south fifty (50) acres of the said east half of the said northeast quarter of the said section thirteen (13), and then and there struck off and sold the same for the sum of twenty-seven thousand and five hundred dollars ($27,500) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the aforesaid lot numbered five (5), in block numbered thirteen (13), in fractional section fifteen (15), addition to Chicago, reference being had to the plat of said addition, which was recorded in the recorder's office of said Cook county, in Book H of Maps, at page 230, new volume H, page 83, said lot fronting east on Michigan

avenue, between Harrison street and Hubbard court, with a width of eighty (80) feet, and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet, to a sixteen-foot alley, together with the three story and basement brick dwelling-house, trimmed with stone, standing on said lot, and all other improvements thereon, and then and there struck off and sold the same for the sum of thirty-five thousand dollars ($35,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the aforesaid lot numbered one
170 (1), in block numbered three (3), in Egandale, which said Egandale is a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter of section eleven (11), in township thirty eight (38) north, of range fourteen (14) east, of the third principal meridian, reference being had to the plat of said Egandale, which was filed for record in the recorder's office of said Cook county on June twelve, A. D. 1868, and then and there struck off and sold the same for the sum of eleven hundred and sixty-one dollars and thirty-eight cents ($1,161.38) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor. The undersigned then offered for sale the aforesaid lots numbered four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), and sixteen (16) in separate lots, and then and there struck off and sold each of the said lots separately for the sum of twelve hundred and fifty dollars ($1,250) for each lot, to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for each of the said lots and she being the highest and best bidder therefor. The undersigned then offered for sale the aforesaid lot numbered seventeen (17), in said block three (3), and then and there struck off and sold the same for the sum of two thousand dollars ($2,000) to the said complainant, who bid for the same by R. W. Hyman, Jr., her agent, that sum being the highest and best sum bid for the same and she being the highest and best bidder therefor, the total of the various sums bid at the aforesaid sales being one hundred and ninety-six thousand three hundred and twelve dollars and
171 seventy cents ($196,312.70);

And, as provided for in said decree, the said complainant (purchaser as aforesaid), by her solicitor, has paid over to the undersigned, as such master in chancery, the sum of two hundred and thirty-one dollars and eighty-two cents ($231.82), being the amount of the taxed costs herein, and also the master's fees, commissions, and disbursements on the said sale.

The first twenty of the before-mentioned sales were made to satisfy the sum of fifty-eight thousand seven hundred and thirty-four dollars and thirty-seven cents ($58,734.37), with interest thereon, at the rate of six per cent. per annum, from said thirteenth day of April, A. D. 1876, and one-half of the taxed costs herein, as directed by the said decree, and were sold for an amount sufficient to satisfy the same,

as well as the master's fees, disbursements, and commissions thereon, as shown by the particular statement of the said sales hereto annexed, marked Exhibit A, and made a part hereof. The remainder of the said sales were made to satisfy the sum of one hundred and twenty-seven thousand eight hundred and thirty-one dollars and seventy-one cents ($127,831.71), with interest thereon, at the rate of six per cent. per annum, from said thirteenth day of April, A. D. 1876, and one-half of the taxed costs herein, as directed by the said decree, and were sold for an amount sufficient to satisfy the same, as well as the master's fees, commissions, and disbursements thereon, as is also shown by the aforesaid statement.

All of which is respectfully submitted.

HENRY W. BISHOP,

172 *Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.*

Dated Chicago, December 27, A. D. 1876.

EXHIBIT A.

31 July, 1876, decree for	$127,831 71
7 December, 1876, interest thereon, at 6%, from the 13th April, 1876	4,985 43
One-half taxed costs	115 91
Master's fees and commissions, as agreed	1,454 33
One-half advertising	24
	$134,411 38
31 July, 1876, decree for	58,734 37
Interest thereon, at 6%, from 13th April, 1876	2,290 64
One-half taxed costs	115 91
Master's fees and commissions, as agreed	736 40
One-half advertising	24
	$61,901 32

Received of Henry W. Bishop, master in chancery, the sum of two hundred and thirty-one dollars and eighty-two cents, being the amount of the taxed costs herein.

WM. H. BRADLEY, *Clerk.*

Settled with H. W. Bishop, master in chancery, in accordance with the above statement.

GEO. F. BAILEY,
Plaintiff's Solicitor.

173 *Master's Sale.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

HETTY H. R. GREEN, Complainant,
vs.
SARAH H. GAGE, EVA GAGE, MARY B. GAGE, CARRIE E. S. GAGE, Alice Gage, George W. Gage, Jr., David A. Gage, William F. Tucker, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, David A. Gage, John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, The Tobey Furniture Company, Julius White, Jonathan Goodwin, Jr., The Mechanics' National Bank of Chicago, The Illinois Trust and Savings Bank, Moore C. White, Charles H. Gaubert, James E. Gross, The Chicago File Company, Charles M. Smith, Monroe Heath, William F. Milligan, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenly, George R. Jenkins, Charles F. Swift, Crane Bros. Manufacturing Company, August Schiffer, The First National Bank of Sioux City, and Charles Tobey, Defendants.

In pursuance of a decree of said court, entered in the above-entitled cause on the 31st day of July, A. D. 1876, I, Henry W. Bishop, master in chancery of the said court, will sell at public auction, to the highest bidder, for cash in hand, at the front door, on La Salle street, of the Republic Life building, numbers 157 to 163 La Salle street, Chicago, Cook county, Illinois, on Thursday, the seventh (7th) day of December, A. D. 1876, at ten (10) o'clock in the forenoon of the said last-mentioned day, the premises and property in the said decree mentioned and described, to wit, all those certain lots, pieces, or parcels of land situate, lying, and being in the county of Cook, in the State of Illinois, known and described as follows, to wit:

174 Lot numbered five (5), in block numbered thirteen (13), in fractional section fifteen (15), addition to Chicago, reference being had to the plat of said addition which was recorded in the recorder's office of said Cook county, in Book H of Maps, at page 230, new volume H, page 83, said lot fronting east on Michigan avenue, between Harrison street and Hubbard court, with a width of eighty (80) feet, and carrying the same width through the whole depth thereof, to wit, one hundred and seventy (170) feet, to a sixteen (16) foot alley, together with the three-story and basement brick dwelling-house, trimmed with stone, standing on said lot, and all other improvements thereon;

Also lots numbered one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block numbered three (3), in Egandale, which said Egandale is a subdi-

vision of the east one hundred and eighteen (118) acres of the southwest quarter of section eleven (11), in township thirty-eight (38) north, of range fourteen (14) east, of the third principal meridian, reference being had to the plat of said Egandale, which was filed for record in the recorder's office of said Cook county on June twelve, A. D. 1868;

Also the south half ($\frac{1}{2}$) of section thirteen (13) and the south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirteen (13) and the east half ($\frac{1}{2}$) of the northeast quarter of section numbered twenty-four (24), all in township thirty-eight (38) north,
of range thirteen (13) east, of the third principal meridian,
175 together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

GEORGE F. BAILEY,
Complainant's Solicitor.

Dated Chicago, November 10, 1876.

This certifies that a notice of master's sale, of which the annexed printed slip is a true copy, was published for twenty-two successive days, to wit, twenty-two times, in the daily edition of the Inter Ocean, exclusive of Sundays, a newspaper published and printed in the city of Chicago, of general circulation throughout Cook county and the State of Illinois; that the date of the first paper containing the same was the 11th day of November, A. D. 1876; that the date of the last paper containing the same was the 6th day of December, A. D. 1876, and that we have received seventy-four and $\frac{80}{100}$ dollars for publishing the same.

Dated at Chicago, this 6th day of Dec., 1876.

WM. PENN NIXON,
Publisher.

(Endorsed:) Filed Jan'y 2, 1877. Wm. H. Bradley, clerk.

176 TUESDAY, *January* 2, 1877.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE *et al.* } In Chancery.

On motion, it is ordered that the report of sale by Henry W. Bishop, Esq., the master in chancery of this court herein, be approved unless cause be shown to the contrary within thirty days.

177 FRIDAY, *February* 2, 1877.

Present: Hon. Henry W. Blodgett, district judge.

HETTY H. R. GREEN
vs.
SARAH H. GAGE, EVA GAGE, MARY B. GAGE, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., David A. Gage, William F. Tucker, Joseph K. Barry, John W. Clapp, Lewis L. Coburn, David A. Gage, John A. Rice, Benjamin E. Gallup, Francis B. Peabody, George L. Paddock, John N. Jewett, Charles T. Adams, The Tobey Furniture Company, Julius White, Jonathan Goodwin, Jr., The Mechanics' National Bank of Chicago, The Illinois Trust and Savings Bank, Moore C. White, Charles H. Gaubert, James E. Gross, The Chicago File Company, Charles M. Smith, Monroe Heath, William F. Milligan, Bradford Hancock, William Coffin, Alexander A. McDonnell, Charles A. Mather, Alexander S. Maltman, George F. Morcom, Clark Lipe, John B. Adams, David Kenley, George R. Jenkins, Charles F. Swift, Crane Bros.
178 Manufacturing Company, August Schiffer, The First National Bank of Sioux City, and Charles Tobey. } In Chancery.

And now again comes the complainant, by George F. Bailey, her solicitor, and it appearing to the court that said defendants failed to pay to the complainant the moneys ordered to be paid to her by the decree of this court entered herein on the thirty-first day of July, A. D. 1876, and that in pursuance with the provisions of said decree in that behalf said premises described therein were sold at public auction by Henry W. Bishop, master in chancery of this court, on the seventh day of December, A. D. 1876, and that at said sale the complainant became the purchaser of said premises, and that on the second day of January, A. D. 1877, the report of the said master showing said sale was filed in this court, and on the same day an order of this court confirming said report of sale, unless cause to the contrary should be shown within thirty days from the date of said last-mentioned order, was entered herein, and it appearing to the court that no exceptions have been filed to said report, and that said sale and proceedings connected therewith was conducted according to the course and practice of this court and were in all respects legally and fairly made, upon motion of complainant's solicitor, no cause to the contrary being shown, it is

ordered that said sale of said premises to said complainant
179 and the report thereof aforesaid of said master in chancery be, and the same are hereby, approved, ratified, and absolutely confirmed.

It is further ordered, adjudged, and decreed that the said master execute and deliver to Hetty H. R. Green, the purchaser named in

said report of sale, a deed conveying said premises and all right and title, legal or equitable, of said defendants therein so by said master sold to her, as in said report mentioned.

And it is further ordered, adjudged, and decreed that the said defendants, and all persons claiming or to claim from or under them, and all persons having a lien subsequent to the trust deed from said George W. Gage and wife to the said Julius White, mentioned in the bill of complaint in this cause, either by judgment or decree or otherwise, upon the premises described in said last-mentioned trust deed, and his and their heirs and personal represen-atives, and all persons having any lien or claim by, from, or under such subsequent judgment, decree, or otherwise, and their heirs and personal represen-atives, and all persons claiming under them, be forever barred and foreclosed from all equity of redemption and other claim, legal or equitable, of, in, and to the said premises described in said last-mentioned trust deed and every part and parcel thereof, and that the said defendants and all persons claiming or to claim from
180 or under them and all persons having a lien subsequent to the trust deed from said George W. Gage and wife to Benjamin E. Gallup mentioned in the bill of complaint in this cause either by judgment or decree or otherwise, upon the premises described in said last-mentioned trust deed and his and their heirs and personal representatives, and all persons having any lien or claim by, from, or under such subsequent judgment, decree, or otherwise, and their heirs and personal represen-atives, and all persons claiming under them, be forever barred and foreclosed from all equity of redemption and other claim, legal or equitable, of, in, and to said premises described in said last-mentioned trust deed and every part and parcel thereof.

And it is further ordered that the said purchaser of said premises be let into possession thereof, and that any of the parties to this suit who may be in possession of said premises or any part thereof and any person or persons who since the commencement of this suit have come into possession under them or either of them deliver possession thereof to said purchaser on production of the master's deed for said premises and a copy of this order confirming said sale.

181 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein John Evans Cornell is complainant and Hetty H. R. Green, Julius White, trustee; Benjamin E. Gallup, trustee; Laura E. Young, C. C. Peterson, Joseph Dow, and John Katzke are defendants, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this eighteenth day of July, 1892.

S. W. BURNHAM, *Clerk.*

182 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To Hetty H. R. Green and to Messrs. Bisbee, Ahrens & Decker, solicitors for Hetty H. R. Green:

You, the said Hetty H. R. Green, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the sixth day of August, 1892, pursuant to a decree filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein John Evans Cornell is appellant and Hetty H. R. Green is respondent, to show cause, if any there be, why the decree in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

W. Q. GRESHAM,
Circuit Judge.

Original service only.

Rec'd copy of foregoing citation this 11th day of July, A. D. 1892.

L. H. BISBEE,
Sol. for Hetty H. R. Green.

Endorsed on cover: Case No. 15,141. N. Illinois C. C. U. S. Term No., 160. John Evans Cornell, appellant, *vs.* Hetty H. R. Green. Filed September 17th, 1892.

CASE No. 15,141.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~1171~~. ~~816~~ 447 160

JOHN EVANS CORNELL, APPELLANT,

vs.

HETTY H. R. GREEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 17, 1892.

CASE No. 15,141.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1171.

JOHN EVANS CORNELL, APPELLANT,

vs.

HETTY H. R. GREEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Bond for costs	2	1
Transcript from State court	3	2
Bill of complaint	3	2
Summons and return	16	8
Petition for removal	18	10
Bond for removal	20	11
Order granting leave to file petition for removal	21	11
Clerk's certificate	22	11
Chief Justice's certificate	22	11
Motion to remand	24	11
Stipulation to place motion on calendar	25	12
Order taking motion to remand under advisement	26	12
Appearance of Hetty H. R. Green	27	14
Demurrer of Hetty H. R. Green to bill	28	14
Order taking demurrer under advisement	31	16
Opinion of Judge Blodgett	32	16
Final decree	41	21
Petition for appeal	42	21
Assignment of errors	43	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1893.

	Original.	Print.
Order allowing appeal	45	22
Appeal bond	46	23
Exhibit to original case—Record in case of Hetty H. R. Green *vs.* Sarah H. Gage *et al.* (omitted in printing)	48	—
Clerk's certificate	181	23
Citation and proof of service of same	182	24

1 Pleas in the circuit court of the United States of America for the northern district of Illinois, northern division, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, on Monday, the fourteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and ninety, and of our Independence the one hundred and fifteenth year.

S. W. BURNHAM, *Clerk.*

JOHN EVANS CORNELL *vs.* HETTY H. R. GREEN, JULIUS WHITE, Trustee; Benjamin E. Gallup, Trustee; Laura E. Young, C. C. Peterson, Joseph Dow, and John Katzke.	21630.	In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the third day of May, 1890, came the defendants, by their solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their bond for costs and a transcript of record from the circuit court of Cook county, Illinois, in said entitled cause; which said bond and record are in the words and figures following, to wit:

2 *Bond for Costs.*

UNITED STATES OF AMERICA, *Northern District of Illinois, Northern Division,* } *ss:*

Circuit Court, April Term, A. D. 1890.

JOHN EVANS CORNELL *vs.* HETTY H. R. GREEN *et al.* } In Chancery.

We enter ourselves as security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the defendant Hetty H. R. Green of any costs ordered or adjudged to be paid by her we hereby agree and stipulate that execution may issue against our property for any costs taxed against her.

Dated this third day of May, A. D. 1890.

HOYNE, FOLLANSBEE & O'CONNOR,
88 *La Salle St.*

(Endorsed:) Filed May 3, A. D. 1890. Wm. H. Bradley, clerk.

1—1171

STATE OF ILLINOIS, } ss:
County — Cook, }

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 17th day) of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Present: Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, State of Illinois; J. M. Longnecker, state's attorney; Canute R. Matson, sheriff.

Attest: HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 4th day of April, A. D. 1890, there was filed in said court a certain bill, and there issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which said bill and writ, with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

Bill.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

 To the judges of the circuit court of Cook county, Illinois, in chancery sitting:

Your orator, John Evans Cornell, represents unto your honors that he is a resident of the city of Chicago, in the county and State aforesaid; that he brings this bill against Hetty H. R. Green, of the city and State of New York; Julius White, trustee; Benjamin E. Gallup, trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, of Cook county, State of Illinois.

Your orator represents that on July 22nd, 1871, one George W. Gage was seized of and was the owner in fee simple of the following-described property, to wit:

Lot five (5), in block thirteen (13), fractional section fifteen (15), addition to Chicago.

Also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter ($\frac{1}{4}$) of section eleven (11), township thirty-eight (38) north, range fourteen (14).

Also the south half ($\frac{1}{2}$) of section — (13), township thirty-eight (38) north, range thirteen (13).

Also the south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast —

(¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the east half (½) of the northeast quarter (¼) of section twenty-four (24), township thirty-eight (38) north, range thirteen (13).

All of said property being situate east of the third (3rd) principal meridian in the county of Cook and State of Illinois.

That said Gage, being said owner as aforesaid, to secure the payment of fifty thousand dollars ($50,000), with interest at the rate of nine (9 %) per centum per annum, executed his bond in the penal sum of sixty thousand dollars ($60,000) to the Travellers' Insurance Company of Connecticut, and said Gage, his wife joining with him, executed and delivered to Julius White, trustee, a trust deed dated July 22nd, 1871, in and by which said trust deed said Gage conveyed to said White, as trustee, to secure the payment of said bonds the following-described property, to wit:

The south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13); also the south fifty (50) acres of the east half (½) of the northeast — (¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the east half (½) of the northeast quarter (¼) of section twenty-four (24), township thirty-eight (38) north, range thirteen (13).

All east of the third (3rd) principal meridian in Cook county, in the State of Illinois.

Your orator further represents that George W. Gage, David A. Gage, and John A. Rice on May 7th, 1873, executed and delivered to said Hetty H. R. Green their note in the sum of one hundred thousand dollars ($100,000), with interest at the rate of ten (10 %) per centum per annum, payable half yearly on the 7th days of May and of November in each year, at the office of John J. Cisco & Son, in the city of New York; also six (6) interest-coupon notes for the sum of five thousand dollars ($5,000) each, and to secure the payment of said notes the said George W. Gage and Sarah H. Gage, his wife, joining with him, executed and delivered to Benjamin E. Gallup, trustee, and Francis B. Peabody, successor in trust, a trust deed dated May 7th, 1873, and filed for record May 17th, 1873, in the recorder's office in Cook county, in and by — said trust deed said Gage conveyed to said Gallup, said trustee, to secure said note of one hundred thousand dollars ($100,000) and interest, the following-described property, to wit:

Lot five (5), in block thirteen (13), in fractional section fifteen (15), addition to Chicago.

Also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter (¼) of section thirteen (13), township thirty-eight (38) north, range fourteen (14).

Also the south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the south fifty (50) acres of the east half (½) of the northeast

quarter (¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

All east of the third (3rd) principal meridian in the county of Cook and State of Illinois.

7 Your orator would further represent that he is unfamiliar with the exact terms and conditions of both said trust deeds and the notes and bonds secured thereby, but for greater certainty, and particularly as to the terms, conditions, and agreements in said trust deeds, notes, and bonds contained, would refer to the files and exhibits in case of Green *vs.* Gage in the United States circuit court for the northern district of Illinois, and number 13072, and hereinafter more particularly mentioned, and would ask to have said files and exhibits made a part of this bill.

Your orator further represents that said George W. Gage and Sarah H. Gage, his wife, by warranty deed dated December 18th, 1874, and recorded in the recorder's office of Cook county December 19th, 1874, conveyed to one William F. Tucker all the property hereinbefore described as being conveyed by the two (2) trust deeds heretofore mentioned, to wit:

The south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the south fifty (50) acres of the east half (½) of the northeast quarter (¼) of section thirteen (13), township thirty-eight (38) north, range thirteen (13).

Also the east half (½) of the northeast quarter (¼) of section twenty-four (24), township thirty-eight (38) north, range thirteen (13).

Also lot five (5), in block thirteen (13), in fractional section fifteen (15), addition to Chicago.

8 Also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the southwest quarter (¼) of section eleven (11), township thirty-eight (38) north, range fourteen (14), and other property, all of said described property being situate east of the third (3rd) principal meridian in the county of Cook and State of Illinois, by which said deed the said Tucker became the absolute owner in fee simple of all of said property.

Your orator further represents that he is informed and believes and so charges the fact to be that said George W. Gage after executing and delivering the said deed to said Tucker departed this life on or about the 24th day of September, A. D. 1875.

Your orator further represents that the said William F. Tucker heretofore mentioned as the grantee in said deed from George W. Gage and wife departed this life on or about the 13th day of September, A. D. 1887, intestate, leaving him surviving his widow, Phœbe Tucker; his children and only heirs-at-law, the following, to wit: William F. Tucker, Annie G. Wilder, the wife of Thomas E. Wilder, and Jennie T. Johnson.

That all of said heirs were at the time of the said death of said Tucker, their father, above the age of twenty-one (21) years; that the said William F. Tucker and Mary L. Tucker, his wife, joining

with him, by good and sufficient deed dated the 25th day of January, A. D. 1890, and recorded in the recorder's office of Cook county on the 27th day of March, A. D. 1890, conveyed to your orator all the property heretofore described as contained in and conveyed by said two (2) trust deeds executed by the said Gage; that Annie G. Wilder and Thomas E. Wilder, her husband, and Jennie T. Johnson, a widow, by good and sufficient deed dated the 15th day of February, A. D. 1890, and recorded in the recorder's office of Cook county on the 27th day of March, A. D. 1890, conveyed to your orator all of said property heretofore described as contained in and conveyed by said two (2) trust deeds executed by the said Gage, by which said two (2) deeds your orator became the absolute owner in fee simple of said property, subject to the two (2) said trust deeds. Said Phœbe Tucker, widow of said Wm. F. Tucker, departed this life in the year 1887, and after the death of said Wm. F. Tucker.

9

Your orator further represents that said Hetty H. R. Green did, on November 27th, 1875, file in the office of the clerk of the circuit court of the United States for the northern district of Illinois a certain bill for the purpose of foreclosing both of the trust deeds heretofore described; that said Hetty H. R. Green in and by the allegations in said bill contained averred that she was the owner by purchase of the bond to the Travellers' Insurance Company heretofore described and secured by the trust deed to said White; that default had been made in the payment of the interest due upon one of the notes secured by said trust deeds, and asking, among other things, that an account be taken of the amount due to said Green upon said notes, and that in default of payment the said property in said bill described and covered by the trust deeds heretofore set forth be sold, and that a decree of foreclosure be entered against certain defendants mentioned in said bill. Your orator would further represent that by the various proceedings had in said cause, which will more fully appear from the orders and records of the circuit court of the United States for the northern district of Illinois and the files of said cause, reference to which is hereto had for more particularity, it appears that a decree of said honorable court was entered in said cause adjudging that there was due to said Green, the complainant therein, the sum of one hundred and eighty-six thousand five hundred and sixty-six ($186,566.00) dollars, with interest from April 13th, A. D. 1876, and that in default of payment within one hundred (100) days therefrom that the master sell said property to satisfy said debt; that afterwards all of said property was sold by said master in chancery, and that on January 2nd, 1877, the sale was confirmed by the order of said honorable court; that on February 2nd, 1877, a final decree of foreclosure was entered in said cause by said honorable court. All of said proceedings, orders, and decrees will more fully appear from the records of said United States circuit court and the files in said cause; all of which records and files are made a part of this bill and referred to for greater certainty.

10

Your orator further represents that Henry W. Bishop, master in

chancery for the circuit court of the United States for the northern district of Illinois, in pursuance of the decree entered in said cause, made, executed, and delivered to Hetty H. R. Green a master's deed, dated February 3rd, 1877, and recorded February 5th, 1877, in the recorder's office of Cook county, in and by which deed the said
11 master conveyed to said Green all of the property heretofore described as contained in the two (2) trust deeds heretofore mentioned.

Your orator would further represent that the said William F. Tucker was the owner in his own right of all said property, and so appeared of record at the time said bill for foreclosure was filed as aforesaid and during the pendency thereof and at the time of said sale and still continued to be the owner thereof up to the time of his death; that the said William F. Tucker was not made a party defendant to said foreclosure proceedings, nor was the said William F. Tucker ever in court or subject to the orders, decrees, and judgments of said court; that said decree of foreclosure so entered as aforesaid was of no binding force or effect upon said Tucker nor upon his heirs nor upon your orator, the grantee of said property as aforesaid.

Your orator would further represent that he is now in the actual possession and occupation of a portion of the premises heretofore described, to wit, lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16), and seventeen (17), in block three (3), in Egandale.

Your orator further represents that said defendant, Laura E. Young, is in the actual possession and occupation of lot five (5), in block thirteen (13), in fractional section fifteen (15), addition to Chicago, but your orator is informed and believes and so charges the fact to be that said defendant had no other or further interest in said property than as tenant on said premises by lease from said Hetty H. R. Green, but that the terms of said lease are unknown to your orator.

12 Your orator further represents that the said defendant, G. C. Peterson, is in the possession and occupation of the following-described property, to wit: The south half ($\frac{1}{2}$) of section thirteen (13), township thirty-eight (38) north, range thirteen (13); also the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section twenty-four (24), township thirty-eight (38) north, range thirteen east, of the third (3rd) principal meridian; but your orator is informed and believes and so charges the fact to be that said defendant has no other or further interest in said property than as tenant under a lease from said Hetty H. R. Green, but that the terms of said lease are unknown to your orator.

Your orator further represents that the said defendant, Joseph Dow, is in the possession and occupation of the following-described property, to wit: The south fifty (50) acres of the east half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirteen (13), township thirty-eight (38) north, range thirteen (13) east, of the third (3rd) principal meridian; but your orator is informed and believes and so charges the fact to be that said defendant has no other or further

interest in said property than as tenant under a lease from said Hetty H. R. Green, but that the terms of said lease are unknown to your orator.

Your orator further represents that one John Katzke, one of the defendants herein, is an occupant of a portion of the south half (½) of section thirteen (13), township thirty-eight (38) north, range thirteen (13) east, of the third (3rd) principal meridian; but your orator is informed and believes and so charges the fact to
13 be that said defendant has no other or further interest in said property than as tenant of the defendant G. C. Peterson, but that the terms of said lease are unknown to your orator.

Your orator would further represent unto your honor that large amounts of money have been received by said defendant, Hetty H. R. Green, as rents and profits arising from said premises; all of which your orator is in equity entitled to receive.

Your orator further represents that he is willing and hereby offers to pay and tenders any amount of money which in equity and good conscience this honorable court shall decree to be due and owing to said Hetty H. R. Green upon a redemption of said premises from the trust deeds heretofore described.

Your orator further represents that the said defendant, Benjamin E. Gallup, was the trustee in the trust deed mentioned as given by George W. Gage and wife to secure the said note to said Green as aforesaid; that said Gallup has no other or further interest in said premises than as the trustee in said trust deed mentioned.

Your orator further represents that said defendant, Julius White, was the trustee in said trust deed mentioned as given by George W. Gage and wife to secure a bond of sixty thousand dollars ($60,000) to the Travellers' Insurance Company; that said White has no other or further interest in the said premises than as the trustee in said trust deed mentioned.

Your orator further represents that said defendant, Green, is now a resident of the city and State of New York, and has been ever since and prior to the commencement of said foreclosure suit in
14 said United States circuit court a resident of said State of New York.

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, and to the end that the said Hetty H. R. Green, Laura E. Young, G. C. Peterson, Joseph Dow, John Katzke, Julius White, trustee, and Benjamin E. Gallup, trustee, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, their answer under oath being hereby waived, and especially that said defendant, Green, may be compelled to fully and particularly answer and set forth all and every moneys that may have been received by her as rents and profits for the use of said premises heretofore described; that said Green may fully answer and set forth what yearly rent or rents that portion of said premises of which said Green has had possession have or might have been let since she has been in possession thereof, and that an account may be taken under the direction of this court of what is now due and owing to the defendant Green

for the principal sum and interest aforesaid, and that an account may be taken of the rents and profits of said premises received by said defendant, Green, or her agents or any other person on her behalf, or which, without her wilful neglect or default, might have been received by her since she entered into possession of said premises, and that upon the payment by your orator of what, if anything, shall be found remaining due to said defendant, Green, in respect of the said principal sum and interest, which your orator hereby offers to pay, the said defendants may be decreed to surrender and deliver up the possession of said mortgaged premises to your orator, and that the the defendants Benjamin E. Gallup, trustee as aforesaid,
15 and Julius White, trustee as aforesaid, may be compelled to release said trust deeds upon the records of said county, and that upon default thereof that the master may, by the order of this court, release said trust deeds; that the decree heretofore entered in the United States circuit court for the northern district of Illinois in the suit of said Green to foreclose said trust deeds herein described may be decreed a cloud upon your orator's title to the premises herein described and set aside as null and void as to your orator's interest in said premises, and that the deeds heretofore described as executed by the master in chancery in this court to said defendant Green may be declared and decreed null and void and of no force and effect as against the title of your orator in the premises herein described, and that your orator may have such other and further relief as equity may require and to your honor shall seem meet—

May it please your honor to grant the writ of summons in chancery, directed to the sheriff of said county of Cook, commanding him that he summon the said defendants, Hetty H. R. Green, Benjamin E. Gallup, Julius White, Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, to appear before said court on the first day of the next term thereof, to be held at the court-house in Chicago, in the county of Cook aforesaid, then and there to answer this bill, &c.

JOHN E. CORNELL, *Complainant.*

F. B. DYCHE, *Solicitor.*
ARMSTRONG. READ & DYCHE, *Of Counsel.*

16 *Summons.*

STATE OF ILLINOIS, } ss:
County of Cook, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Hetty H. R. Green, Benjamin E. Gallup, Julius White, Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, if they shall be found in your county, personally to be and appear before the circuit court of Cook county on the first day of the term thereof, to be holden at the court-house in Chicago, in said Cook county, on the third Monday of April, A. D.

1890, to answer unto John Evans Cornell in his certain bill of complaint filed in said court on the chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Henry Best, clerk of said court, and the seal thereof, at Chicago, in said county, this 4th day of April, A. D. 1890.

[SEAL.] HENRY BEST, *Clerk.*

Endorsement: P'd 1.00. P'd 5.55, M. 2.40. I hereby appoint C. L. Harper my special deputy to serve the within writ. Canute R. Matson, sheriff. Chicago, April 4th, 1890.

STATE OF ILLINOIS, } ss:
County of Cook, }

C. L. Harper, being sworn, deposes and says that he is the
17 person appointed to serve the with- writ, and he further affirms that he served the same on the within-named Hetty H. R. Green by reading to and delivering to her a true copy thereof this 4th day of April, A. D. 1890.

C. L. HARPER.

Subscribed and sworn to before me this 5th day of April, A. D. 1890.

[SEAL.] WILLIAM FRIES,
Notary Public.

Also served this writ upon the within-named defendant, Julius White, by delivering a copy thereof to him this 8th day of April, A. D. 1890; also served this writ upon the within-named defendant, Benj. E. Gallup, by leaving a copy thereof at his usual place of abode with Dilla L. Gallup, a member of his family over the age of ten years, and at the same time informing her of the contents thereof this 8th day of April, A. D. 1890; also served this writ upon the within-named defendant, Laura E. Young, by leaving a copy thereof at her usual place of abode with Bess-e Corner, a member of her family over the age of ten years, and at the same time informing her of the contents thereof this 8th day of April, A. D. 1890.

Also served this writ on the within-named defendant, G. C. Peterson, by leaving a copy thereof at his usual place of abode with Lissie Peterson, a member of his family over the age of ten years, and at the same time informing her of the contents thereof this 10th day of April, A. D. 1890.

Also served this writ upon the within-named defendant-, Joseph Dow and John Katzke, by delivering a copy thereof to each
18 of them this 10th day of April, A. D. 1890.

CANUTE R. MATSON, *Sheriff,*
By HENRY J. BEER, *Deputy.*

And afterwards, to wit, on the 21st day of April, A. D. 1890, there was filed in said cause a certain petition for removal of said cause

to the United States circuit court for the northern district of Illinois; which said petition is in the words and figures following, to wit:

Petition.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County. In Chancery.

JOHN EVANS CORNELL, Complainant,
vs.
HETTY H. R. GREEN, JULIUS WHITE, Trustee; BENJAMIN E. Gallup, Trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke, Defendants.

Petition for removal to the circuit court of the United States for the northern district of Illinois.

To the honorable the judges of the circuit court of Cook county, Illinois, in chancery sitting:

Your petitioner, Hetty H. R. Green, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

19 Your petitioner further shows that the complainant in the above-entitled cause was at the time of the commencement of this suit and still is a resident of the city of Chicago, in the county and State aforesaid, and a citizen of the State of Illinois, and that your petitioner was and still is a resident and citizen of the State of Vermont.

Your petitioner further states that in the said suit above mentioned there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between your petitioner and the said complainant, John Evans Cornell.

And your petitioner offers herewith a bond with a good and sufficient surety for her entering in said circuit court of the United States for the northern district of Illinois on the first day of its next session a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court of the United States for the northern district of Illinois if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays this honorable court to proceed no further in said suit except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States for the northern district of Illinois.

And she will ever pray, etc.

HETTY H. R. GREEN.

20 STATE OF ILLINOIS, } ss:
County of Cook, }

Hetty H. R. Green, being duly sworn, upon oath says that she is one of the defendants in the above-entitled cause; that she has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true.

HETTY H. R. GREEN.

Subscribed and sworn to before me this 18th day of April, A. D. 1890.

[SEAL.] W. H. ROSE,
Notary Public.

HOYNE, FOLLANSBEE & O'CONNOR,
Sol'rs for said Petitioner.

Bond.

Know all men by these presents that I, Hetty H. R. Green, as principal, and Peyton R. Chandler, as surety, are held and firmly bound unto John Evans Cornell in the penal sum of five hundred dollars; — the payment whereof, well and truly to be made, unto the said John Evans Cornell, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon this condition: The said Hetty H. R. Green having petitioned the circuit court of Cook county, in the State of Illinois, for the removal of a certain cause therein pending, wherein the said John Evans Cornell is complainant and the said Hetty H. R. Green, Julius White, trustee; Benjamin E. Gallup, trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke are
21 defendants, to the circuit court of the United States for the northern district of Illinois:

Now, if the said Hetty H. R. Green, the petitioner, shall enter in said circuit court of the United States for the northern district of Illinois on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 18th day of April, A. D. 1890.

HETTY H. R. GREEN. [SEAL.]
PEYTON R. CHANDLER. [SEAL.]

And thereupon, on the same day, to wit, the 21st day of April, A. D. 1890, the following, among other, proceedings were had and entered of record in said court, to wit:

JOHN EVANS CORNELL
vs. } 80450, 5256. Bill.
HETTY H. R. GREEN.

On motion, it is ordered that leave —, and it hereby is, granted

Hetty H. R. Green to file her petition for the removal of this cause into the United States circuit court for the northern district of Illinois.

22 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause lately pending in said court, on the chancery side thereof, between John Evans Cornell, complainant, and Hetty H. R. Green *et al.*, defendants.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Chicago, in said county, this 28th day of April, A. D. 1890.

HENRY BEST, *Clerk.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, M. F. Tuley, chief justice of the circuit court of Cook county, in the State of Illinois, hereby certify that Henry Best, who signed the above certificate, was at the time of signing the same and is now clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record, having a clerk and seal; that said attestation is in due form and by the proper officer, according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal, at Chicago, in said county of Cook, this 28th day of April, A. D. 1890.

M. F. TULEY, [SEAL.]
Chief Justice of the Circuit Court of Cook County.

(Endorsed:) Filed May 3, 1890. Wm. H. Bradley, clerk.

23 On the same day, to wit, on the third day of May, 1890, came the complainant, by his solicitor, and filed in said clerk's office his motion to remand, and also a stipulation in said entitled cause; which said motion and stipulation are in the words and figures following, to wit:

24 *Motion and Stipulation.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN E. CORNELL }
vs.
HETTY H. R. GREEN *et al.* }

And now comes John E. Cornell, the complainant in the bill of

complaint filed in the above cause, and moves said court to remand said cause to the circuit court of Cook county on the following grounds:

First. That the said bond and petition for removal are insufficient and informal and not as by law required.

Second. That said cause was improperly and without lawful authority removed to this court.

Third. That this court has no jurisdiction of said cause.

And bases his said motion upon the petition and bond filed herein for the removal of said cause from said circuit court of Cook county to this court, and also upon the bill filed herein and the records in said cause.

Dated Chicago, Illinois, May 2d, A. D. 1890.

F. B. DYCHE,
Sol'r for Comp't, John E. Cornell.

25 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN E. CORNELL }
vs.
HETTY H. R. GREEN *et al.* }

It is hereby stipulated and agreed between the parties hereto that the clerk of said court shall place said cause, being a motion to remand, upon the contested calendar, before Judge Blodgett for Monday, the 5th day of May, A. D. 1890.

F. B. DYCHE, *Sol'r for Compl't.*
HOYNE, FOLLANSBEE & O'CONNOR,
Sol'rs for Def't Green.

Dated Chicago, Illinois, May 2nd, A. D. 1890.

(Endorsed:) Filed May 3, 1890. Wm. H. Bradley, clerk.

26 Afterward, to wit, on the fifth day of May, in the adjourned May term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN EVANS CORNELL }
v. } In Chancery.
HETTY H. R. GREEN *et al.* }

Now come the parties, by their solicitors, and the complainant's motion to remand this cause comes on to be heard, and after hearing the arguments of counsel the court takes the same under advisement.

On the same day, to wit, on the fifth day of May, 1890, came Hetty H. R. Green, by her solicitors, and filed in said clerk's office her appearance in said entitled cause; which said appearance is in the words and figures following, to wit:

27 *Appearance of Hetty H. R. Green.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JOHN EVANS CORNELL }
vs. } In Chancery.
HETTY H. R. GREEN *et al.* }

We hereby enter the appearance of Hetty H. R. Green, one of the defendants in the above-entitled cause.

May 5, 1890.

HOYNE, FOLLANSBEE & O'CONNOR,
Sol'rs and of Counsel for Defendant Hetty H. R. Green.

(Endorsed:) Filed May 5, 1890. Wm. H. Bradley, clerk.

Afterward, to wit, on the twenty-sixth day of May, 1890, came Hetty H. R. Green, by her solicitors, and filed in said clerk's office her demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

28 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court Thereof.

JOHN EVANS CORNELL }
vs. }
HETTY H. R. GREEN, JULIUS WHITE, Trustee; BENJAMIN E. Gallup, Trustee; Laura E. Young, G. C. Peterson, Joseph Dow, and John Katzke. }

The several demurrer of Hetty H. R. Green, one of the above-named defendants, to the bill of complaint of the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill and for cause of demurrer shows that the complainant has not in and by his said bill made or stated such a case as entitles him in a court of equity to any discovery or relief from or against this defendant touching the matters contained in the said bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in the said bill of complaint this defendant demurs to the said bill and to the matters and things therein contained and prays the judgment of this honorable court whether she shall be com-
29 pelled to make any further or other answer to the said bill, and she prays to be dismissed with her reasonable costs in this behalf sustained.

JOHN P. AHRENS,
HENRY DECKER,
Solicitors for said Defendant, Hetty H. R. Green.

We do hereby certify that in our opinion the foregoing demurrer of Hetty H. R. Green, defendant, to the bill of complaint of John Evans Cornell, complainant, is well founded in point of law and proper to be filed in the above cause.

JOHN P. AHRENS,
HENRY DECKER,
Solicitors for said Defendant, Hetty H. R. Green.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Cook County. }

John P. Ahrens, being duly sworn, deposes and says that he is one of the solicitors for the above-named defendant, Hetty H. R. Green, and that the said Hetty H. R. Green is a non-resident of the State of Illinois, and that it is inconvenient for this affiant to procure from her the affidavit required by the rules of this court to accompany a demurrer, and therefore this affiant makes this affidavit on her behalf.

This affiant further says that he knows of his own knowledge and therefore avers the fact to be that the foregoing demurrer of
30 said Hetty H. R. Green to the bill of complaint of the above-named John Evans Cornell in this suit is not interposed for the purpose of delaying said suit or any proceeding therein.

JOHN P. AHRENS.

Subscribed and sworn to before me this 26th day of May, A. D. 1890.

[SEAL.] JAMES TODD,
Notary Public.

(Endorsed:) Filed May 26, 1890. Wm. H. Bradley, clerk.

31 Afterward, to wit, on the thirtieth day of June, in the adjourned May term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

Now come the parties, by their solicitors, and the demurrer of the defendant Green comes on to be heard, and, after hearing the argument of counsel, the court takes the same under advisement.

Afterward, to wit, on the fourteenth day of July, 1890, there was filed in said clerk's office the opinion of Judge Blodgett in said entitled cause; which said opinion is in the words and figures following, to wit:

32 In the Circuit Court of the United States for the Northern District of Illinois.

JOHN E. CORNELL
vs.
HETTY H. R. GREEN *et al.*

JULY 14, 1890.

BLODGETT, *J.:*

The defendants have interposed a general demurrer to the bill filed in this case, which has been argued and submitted.

The bill charges, in substance, that in 1871 George W. Gage was the owner of divers lots and parcels of land in the city of Chicago and vicinity, upon which he made a trust deed to secure the payment of his notes to the amount of $50,000; and that in 1873 he made another trust deed upon the same property to secure the payment of notes to the amount of $100,000, making a total encumbrance upon the property of $150,000 and accruing interest; that in December, 1874, after the making and recording of the aforementioned trust deed, Gage made a deed in fee simple of the same lands to William F. Tucker, which was duly recorded in the office of the recorder of Cook county.

That George W. Gage died in September, 1875, after the execution and recording of said deed to Tucker, and that Tucker died about September, 1887, leaving him surviving a widow and two children as his heirs-at-law, and that since the 25th day of
33 January, 1890, those two children and heirs of Tucker have conveyed all their right, title, and interest in the said property to the complainant.

The bill further charges that in November, 1875, the defendant Mrs. Green, having become the owner and holder of the notes secured by said two trust deeds, filed in this court a bill to foreclose the same; that such proceedings were had in said case as that a decree of foreclosure was entered, finding that there was due to the complainant, Mrs. Green, the sum of $186,566, and that on the 2nd

day of January, 1877, all the said lots and parcels of land were sold under said decree and Mrs. Green became the purchaser thereof, which sale was duly confirmed and a deed made to the purchaser by the master in chancery of this court.

The bill further alleges that William F. Tucker was the owner of record of all the said lots and parcels of land at the time of the foreclosure proceedings and so remained up to the time of his death; that he was not made a party defendant to the foreclosure proceedings, nor ever in court nor subject to the orders, decrees, or judgment of this court, and avers that the foreclosure decree is not binding on him or on his heirs or on the complainant as a grantee of his heirs. Complainant then asks that an accounting be had of the rents and profits of the property since the conveyance thereof to the defendant Mrs. Green and others, and offers to pay whatever was found to be due upon the said trust deeds after deducting rents and profits received by Mrs. Green, and prays that he be allowed to redeem said premises on the payment of whatever shall be
34 found due. The bill refers to the orders, decrees, and files in the foreclosure proceedings for more specific statements and details in regard to what was done in that suit and makes the same a part of the bill. An examination of the bill in the foreclosure case shows that the introductory clause of said bill was as follows:

"Your oratrix, Hetty H. R. Green, who is a resident of Bellows Falls, in the State of Vermont, and citizen of said last-named State, brings this her bill of complaint against Sarah H. Gage, a resident of the city of Chicago, Illinois, a citizen of the State of Illinois, and the widow of the late George W. Gage, of Chicago, deceased, and executrix of his last will and testament; Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of the said George W. Gage, deceased, each of said children being now residents of the city of Chicago and citizens of the State of Illinois, the said two last-named children, George W. Gage, Jr., and David A. Gage, being minors; William F. Tucker, Joseph K. Barry, and John W. Clapp, all of whom are residents of the county of Cook, State of Illinois, and citizens of said last-named State and guardians of said minor children.

"The said William F. Tucker being also one of the executors of the last will and testament of said George W. Gage, deceased."

And in another part of the bill the complainant states as follows:

"Your oratrix further shows that the said George W. Gage, the maker of said notes, heretofore, to wit, on the 24th day of
35 September, 1875, at Chicago aforesaid, departed this life, leaving him surviving the said Sarah H. Gage, his widow, and the said Eva Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., David A. Gage, his only children, the last two named being minors, and leaving a last will and testament, in and by which he appointed the said William F. Tucker, Lewis L. Coburn, and his said widow executors and executrix, and devised to them, upon certain conditions therein named, all his real estate,

having before that time, as appears by the records in said recorder's office, by deed executed by himself and wife, dated December 18, 1874, and recorded in said recorder's office December 19, 1874, for the consideration as expressed in said deed of $24,000, conveyed to said Tucker all said premises herein described, subject to said incumbrances.

"Your oratrix further shows that said above-named parties against whom this bill of complaint is brought have or claim to have some interest in said premises described in said trust deeds by mortgage, judgment, conveyance, or otherwise, but your oratrix states those interests, whatever they are, are subject to the rights of your oratrix under her securities before mentioned and cannot be set up against the same nor in any way interfere therewith." And the prayer for process was that the process of the court might issue "directed to the said Sarah H. Gage and the other defendants hereinbefore named," &c.

The summons was issued in the case and ran against Sarah H. Gage, widow, and the children of the said George W. Gage (naming them), William F. Tucker, Joseph K. Barry, John W. Clapp, guardian, &c., William F. Tucker, executor, &c., and
36 the return of the marshal was that he had served the writ by personally delivering a true and correct copy thereof to each of the defendants named, including the name of William F. Tucker, guardian, and William F. Tucker, executor, on the 8th day of December, 1875.

This summons was returnable on the first Monday in January, 1876. On the 5th day of April, 1876 (the first Monday of April having been on the third day of said month), default was entered in said cause, the record entry of which recited, first, service upon some of the defendants and appearances by them, and then proceeds--

"And it appearing that due and legal personal service has been had upon all the other remaining defendants in this cause by service of subpœna in this cause upon them respectively, and that each and all the defendants in this cause are now legally before this court and subject to its jurisdiction, and that neither of said defendants have pleaded, answered, or demurred therein excepting the following-named defendants (naming them, not including Tucker in any capacity)."

The order was in the following words:

"On motion of complainant's solicitor, it is ordered that each and all of said defendants who have not pleaded, answered, or demurred as aforesaid, namely" (then naming the widow and children of George W. Gage, William F. Tucker, and others—naming them), "do plead, answer, or demur to the bill of complaint in this cause instanter, and said last-named defendants having each been
37 three times called so to do come not, but make default, and it is hereby ordered, adjudged, and decreed that as to each of said defendants last named and so making default as aforesaid said bill of compaint and the matters and things therein contained be taken as and for confessed."

It will be seen from these quotations from the record that, while the bill in this case avers that Tucker was not made a party and not brought before the court, it does appear that he was made a party distinctly in his representative capacity as executor and guardian, and that the bill also clearly and distinctly charged that the conveyance was made to him by Gage in December, 1874, whereby he became the owner of the premises in question subject to the trust deeds. The bill averring therefore a mere legal conclusion as to Tucker's not being a party, that averment is not admitted by the demurrer unless facts and circumstances set forth are sufficient to sustain the allegation.

Gould *vs.* Evansville, etc., R. R. Co., 91 U. S., 526.

There can be no doubt that Tucker was before the court in his representative capacities and that the bill also contained sufficient averments to put him upon answer as to his individual interest in the subject-matter of the controversy. In Brasher *v.* Van Cortland, 2 Johnson's Ch'y Rep., 242, the bill was against a committee of a lunatic. The subpœna was issued by the clerk of the court, but he omitted the addition of the plaintiffs as executors and of the defendants as a committee, believing those additions unnecessary in the process.

A default was taken against the defendants as committee and a decree entered against them as such.

38 Upon an application to set aside the default and decree upon the ground that they were not served as a committee, the court held that the defendants were too late for this objection and that the process was sufficiently applicable to that bill.

And in Executor of Walton *v.* Herbert, 3 Green's Ch'y Rep. (N. J.), 73, the bill was filed against James Herbert, surviving executor of James Herbert, deceased. The prayer was for process against said James Herbert.

The subpœna issued against James Herbert generally without stating his official character or stating the character in which he was sued. On a demurrer to the bill the court said:

"It is by inspecting the bill that the defendant ascertains the nature of the charge against him. The subpœna only gives him notice that there is a bill filed against him, and if he be properly charged in the bill as executor or devisee or in any other capacity it is not a good objection that the subpœna is issued against him generally."

Upon the principle asserted in this case it seems quite clear to me that Tucker, having been served with process in his representative capacity, was chargeable with notice of the entire contents of the bill so far as it affected him in his representative or his individual capacity, and that it does not lie in his mouth to say that he was not properly before the court. When Mr. Tucker was summoned into court as executor and guardian he was chargeable with notice of the entire contents and scope of the bill both as it

39 affected his representative and his individual capacity. He certainly must be conclusively presumed to have known that

a bill was pending to foreclose those two trust deeds upon the property which he had acquired by the deed from Gage in December, 1874, and that he had himself individually acquired title to these lands by a deed from Gage subsequent to the making of those trust deeds.

I am, therefore, clear that Tucker was sufficiently made a party before the court to bind him in his individual as well as his representative capacity.

The record entry of the default also recites that all the parties defaulting, among whom were Tucker, had been duly served with process, and as there was ample time between the issue and return of the summons served on Tucker in his representative capacity and the time default was taken at the April term, 1876, for the issue of an alias or plures summons and service upon Tucker individually, the court will, I think, presume that such service was obtained as is recited in the order of the court.

Robinson *v.* Fair, 128 U. S. (page 87).
Sargent *v.* State Bank of Ind., 12 How., 371.
Mulvey *v.* Gibbons, 87 Ill., 367.

It may also, I think, be urged with great force that this bill should not be sustained on the ground of the laches of the complainant. Tucker acquired his title before the foreclosure proceedings. The foreclosure proceedings were completed on the 2nd of January, 1877. Tucker lived until September, 1887, nearly ten years, and there is no allegation or statement in the bill that his heirs-at-law were then laboring under any disability. This suit was not commenced until April, 1890, so that there has been a period of over thirteen years since the commencement of the foreclosure proceedings and the vesting of the absolute title to this property in the complainant, and yet no attempt is made to explain this long delay or to give any reason why the complainant or those under whom the complainant claims have not instituted proceedings at an earlier day, and it has been held by the Supreme Court of the United States that laches may be availed of as a defense on demurrer.

Lansdale *v.* Smith, 106 U. S., 391.
Speidel *v.* Henrice, 120 U. S., 377.
Richards *v.* Mackall, 124 U. S., 183.

In the latter case a bill to set aside a marshal's deed nearly twelve years after the sale was held to be too late and the laches was held sufficient on demurrer.

I choose, however, to place my decision in the case upon the ground that Tucker was sufficiently before the court in the foreclosure proceedings to be bound by the decree of sale there made, and that those claiming under him cannot now complain that he was not specifically served with process in his individual capacity.

The demurrer is sustained and the bill dismissed for want of equity.

(Endorsed:) Filed July 14, 1890. Wm. H. Bradley, clerk.

41 On the same day, to wit, on the fourteenth day of July, in the July term of said court, 1890, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Decree.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.* } In Chancery.

Now come the defendants, by their solicitor, and the court, having considered the defendants' demurrer to the bill herein, sustains the same, and it is ordered that said bill be dismissed for want of equity at complainant's costs, and that execution issue therefor.

42 Afterward, to wit, on the seventh day of July, 1892, came the complainant, by his solicitors, and filed in said clerk's office his petition for an appeal in said entitled cause; which said petition is in the words and figures following, to wit:

Petition.

Circuit Court of the United States, Northern District of Illinois.

JOHN EVANS CORNELL, Complainant, Appellant,
vs.
HETTY H. R. GREEN, Respondent, Appellee.

The above-named complainant, John Evans Cornell, conceiving himself aggrieved by the decree entered on the 14th day of July, A. D. 1890, in the above-entitled proceeding dismissing his bill of complaint, doth hereby appeal from said order to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated July 7th, 1892.

ROBERT RAE,
RICHARD S. THOMPSON,
F. B. DYCHE,
Sol'rs for Compl't and Appellant.

(Endorsed:) Filed July 7, 1892. S. W. Burnham, clerk.

43 On the same day, to wit, on the seventh day of July, 1892, came John E. Cornell, complainant, by his solicitors, and filed in said clerk's office his assignment of errors in said entitled cause; which said assignment of errors are in the words and figures following, to wit:

Assignment of Errors on Appeal to the Supreme Court of the United States.

And now comes the appellant, by his solicitors, and assigns the following errors:

1st. That the court erred in dismissing his bill of complaint for want of equity.

2nd. That the court erred in refusing to grant the prayer of the complainant as prayed in his bill of complaint.

3rd. That the court erred in refusing to grant so much of the prayer of said bill of complaint in which it is asked that he be decreed the right to redeem his said lands mentioned in said bill from the mortgage debt due to Hetty H. R. Green.

4th. That the court erred in holding that William F. Tucker, the grantor of the land mentioned in said bill to complainant, was barred of his equity of redemption by reason of the foreclosure proceedings had by Hetty H. R. Green, filed in the United States circuit court for the northern district of Illinois, in the month of November, 1875, in a case in which Sarah H. Gage, William F. Tucker, executor and guardian, and others were defendants, the said Tucker never having been personally sued or served
44 with process or in any way submitted himself to the jurisdiction of said court, and that said finding deprived said complainant of his property without due process of law.

ROBERT RAE,
RICHARD S. THOMPSON,
F. B. DYCHE,
Solicitors for Appellant.

(Endorsed:) Filed July 7, 1892. S. W. Burnham, clerk.

45 On the same day, to wit, on the seventh day of July, in the July term of said court, 1892, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JOHN EVANS CORNELL
vs.
HETTY H. R. GREEN *et al.*
} In Chancery.

Now comes the complainant, by his solicitor, and prays an appeal herein to the Supreme Court of the United States, which is allowed on complainant's filing an appeal bond herein, according to law, in the penal sum of three hundred dollars, with surety to be approved by the court.

46 Afterward, to wit, on the ninth day of July, 1892, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, John Evans Cornell and Paul Cornell, are held and firmly bound unto Hetty H. R. Green in the full and just sum of three hundred dollars to be paid to the said Hetty H. R. Green, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between John Evans Cornell, complainant, and Hetty H. R. Green *et al.*, defendants, a decree was rendered against the said John Evans Cornell, and the said John Evans Cornell having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said Hetty H. R. Green, citing and admonishing
47–180 her to be and appear at a Supreme Court of the United States to be holden at Washington on the sixth day of August, 1892:

Now, the condition of the above obligation is such that if the said John Evans Cornell shall prosecute his appeal to effect and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN EVANS CORNELL. [SEAL.]
PAUL CORNELL. [SEAL.]

Approved by—
W. Q. GRESHAM,
Circuit Judge.

July 9, 1892.

(Endorsed:) Filed July 9, 1892. S. W. Burnham, clerk.

* * * * * * *

181 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein John Evans Cornell is complainant and Hetty H. R. Green, Julius White, trustee; Benjamin E. Gallup, trustee; Laura E. Young, C. C. Peterson, Joseph Dow, and John Katzke are defendants, as the same appears from the records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this eighteenth day of July, 1892.

S. W. BURNHAM, *Clerk.*

182 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To Hetty H. R. Green and to Messrs. Bisbee, Ahrens & Decker, solicitors for Hetty H. R. Green:

You, the said Hetty H. R. Green, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the sixth day of August, 1892, pursuant to a decree filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein John Evans Cornell is appellant and Hetty H. R. Green is respondent, to show cause, if any there be, why the decree in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of July, in the year of our Lord one thousand eight hundred and ninety-two.

W. Q. GRESHAM,
Circuit Judge.

Original served only.

Rec'd copy of foregoing citation this 11th day of July, A. D. 1892.

L. H. BISBEE,
Sol. for Hetty H. R. Green.

Endorsed on cover: Case No. 15,141. N. Illinois C. C. U. S. Term No., 1171. John Evans Cornell, appellant, *vs.* Hetty H. R. Green. Filed September 17th, 1892.

Office Supreme Court U. S.
FILED.
APR 1 1893
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146 150 Centre St., N. Y.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

JOHN EVANS CORNELL

vs.

HETTY H. R. GREEN.

No. 1171.

TO MESSRS. ARMSTRONG, REED & DYCHE, Robert C. Thompson & F. B. Dyche Counsel for Appellants :

Please take notice that on Monday, April 17, 1893, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the following is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

NEWELL MARTIN,
Counsel for the Appellee.

Motion to Dismiss.

Comes now the appellee, by her counsel appearing in that behalf, and moves the Court to dismiss, with costs, the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Circuit Court of the United States for the Northern District of Illinois, and was entered in that Court on July 14, 1890; and the date of the citation to show cause why said decree should not be corrected is July 7, 1892, and the return day named therein is August 6, 1892; and the case was docketed and the record filed in the office of the Clerk of this Court on September 17, 1892; and the jurisdiction of said Court in this case is dependent entirely upon the fact that the opposite parties to this suit are citizens of different states; the time within which to appeal to this Court from said judgment or decree having therefore expired before said citation was issued, and because, as appears on the face of the record, this Court has no jurisdiction of said appeal.

NEWELL MARTIN,
Counsel for Appellee.

Statement of Facts.

The bill in this suit was filed in the Circuit Court of Cook County, Illinois, and removed for diversity of citizenship to the Circuit Court of the United States for the Northern District of Illinois. The plaintiff's motion to remand was denied.

Hetty H. R. Green, defendant, demurred to the bill.

The case was docketed in the United States Circuit Court as case No. 21,630 on May 3, 1890. The decree was duly entered herein on July 14, 1890, sustaining the demurrer of the defendant Hetty H. R. Green.

The citation to show cause why the decree in said appeal mentioned should not be corrected was issued on July 7, 1892, and the case was docketed and the record filed in the office of the Clerk of the Supreme Court of the United States on September 17, 1892. The appeal was thus taken after July 1, 1891.

The jurisdiction of the federal courts in this case is dependent entirely upon the fact that opposite parties to the suit are citizens of different States. No federal question is involved.

Argument.

The jurisdiction of this Court in cases dependent upon diverse citizenship, was taken away by the act of March 3, 1891.

26 Statutes at Large, C. 517, p. 826.
Northern Pacific Railway vs. Amato, 49 Fed. Rep., 881.

By joint resolution of March 3, 1891,

26 Stat., 1115.

the jurisdiction of this Court was preserved as to cases "now pending before it" and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. This was not a "pending case" in this Court in 1891. The decree appealed from was entered before March 3, 1891, and no appeal to the Supreme Court was taken until after July 1, 1891.

The appellant, under the joint resolution, was given the privilege of appealing to this Court until July 1, 1891. He neglected to do so and this Court has therefore no jurisdiction of this cause.

26 Statutes at Large, p. 1115.
Railroad Co. vs. Grant, 98 U. S., 398.
Garney vs. Patrick County, 137 U. S., 141.

The point raised upon this motion has been decided by this Court in the following recent cases:

Wauton vs. De Wolf, 142 U. S., 138.
National Exchange Bank of Baltimore vs. Peters, 144 U, S., 570.
Cincinnati Safe and Lock Company vs. Grand Rapids Safety Deposit Company, 146 U. S., 54.
See also N. Y., L. E. & W. Ry. Co. vs. Bennett, 49 Fed. Rep., 598 (Opinion by Mr. Justice BROWN).

In Wauton vs. De Wolf 142 U. S., 138 *(supra)*, it was claimed that an appeal had been allowed on July 27, 1891. Mr. Chief Justice FULLER, in delivering the opinion of the Court, said:

"The ground of Federal jurisdiction was diverse citizenship.

"By the Act of March 3, 1891 (26 Stat., 826, c. 517)' establishing the Circuit Courts of Appeals, the jurisdiction of this Court, in cases dependent upon diverse citizenship, was taken away; but by the Joint Resolution of March 3, 1891 (26 Stat., 1115), the jurisdiction was preserved as to pending cases, and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891.

"So far then as this second and independent appeal is concerned, it came too late, and, as if the case were now docketed under that appeal, it would have to be dismissed for want of jurisdiction, we are, without passing upon the question of laches, compelled to deny the the motion.

"Motion denied."

Cincinnati Safe and Lock Co. vs. Grand Rapids Safety Deposit Co. 146, U. S., 54:

Judgment rendered April 25, 1891.
Writ of error allowed June 19, 1891.
Petition for allowance of the writ of error and an

assignment of error were filed in the Clerk's office of Circuit Court on July 3, 1891.

Motion to dismiss writ sustained on the authority of:

Wauton vs. DeWolf, 142 U. S., 138.
Brooks vs. Morris, 11 How., 201.
Credit Co. vs. Arkansas Ry., 128 U. S., 258.

In the appendix hereto annexed is so much of the record filed by the appellant in this Court as relates to the questions raised on this motion.

The appellate jurisdiction of the Supreme Court is limited and regulated by statute.

Desty: Fed. Pro., Sec. 690.
Durousseau vs. U. S., 6 Cranch, 307.
U. S. vs. Young, 94 U. S., 259.
Ex parte Vallandigham, 1 Wall., 251.
R. R. Co. vs. Grant, 98 U. S., 401.
Constitution: Art. 3, Secs. 1, 2.

Time for taking an appeal must be reckoned from the date when the decree was actually entered or signed and filed, though it purports to have been entered "as of" a prior day.

Rubber Co. vs. Goodyear, 6 Wall, 153.
Polleys vs. Black River Co., 115 U. S., 81.
Radford vs. Folsom, 123 U. S., 725.
Credit Co. vs. Arkansas Ry. Co., 128 U. S., 258.

The appellate jurisdiction of the Supreme Court cannot be exercised until Congress has prescribed a rule to regulate it, and when a rule has been provided, the Court cannot depart from it.

Wiscart vs. D'Auchy, 3 Dall., 321.
U. S. vs. More, 3 Cranch, 159.
The Lucy, 8 Wall., 307, and other cases.

Appeal taken four years after decree rendered. Nothing in record suggesting disability bringing appel-

lant within the provisions of R. S. Sec. 1008. Court of its own motion dismissed the appeal.

Whitsitt vs. Union Depot Co., 122 U. S., 363.

On dismissal defendant in error may recover motion costs.

Bradstreet Co. vs. Higgins, 114 U. S., 262.
No. Pac. R. R. Co. vs. Amato, 49 Fed. Rep., 881.

NEWELL MARTIN,
Counsel of Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

CASE NO. 15,141. TERM NO. 160.

JOHN EVANS CORNELL, *Appellant,*

vs.

HETTIE H. R. GREEN, *Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

ROBERT RAE,

OF COUNSEL FOR APPELLANT.

RICHARD S. THOMPSON,
F. B. DYCHE,
SOLICITORS FOR APPELLANT.

BARNARD & MILLER, PRINTERS.

DATES.

Dates — Mortgages, July 22, 1871, $50,000; May 7, 1873, $100,000.... 2
G. W. Gage deed to Tucker, December 18, 1874..... 3-6
Gage died September 24, 1875..... 4
Bill of foreclosure November 27, 1875..... 4
W. F. Tucker died September 13, 1887..... 3
Decree in Green vs. Gage April 5, 1876..... 9
Final decree July 31, 1876..... 10
Confirmation of sale February 2, 1877..... 10
Deed to Green July 3, 1877..... 10
Deed from Tucker heirs to Cornell, January 25, 1890.... 10
Bill of appellant filed April 4, 1890..... 19
Decree of dismissal July 14, 1890..... 22
Appeal July 7, 1892..... 22
Record filed in Supreme court, September 17, 1892..... 22

INDEX.

Filed in Circuit court of Cook county April 4, 1890..... 19
Bill—Statements in 2
George W. Gage on the 22d day of July, 1871, was the owner of the mortgaged premises..... 2
Borrowed July 22, 1871, $50,000 from the Travellers' Ins. Co. of Connecticut..... 2
Interest on same, nine per cent. per annum..... 2
May 7, 1873, borrowed of the appellee on the same, $100,000, ten per cent. interest per annum..... 2
To secure this indebtedness, mortgage was made to Hettie H. R. Green..... 2
Description of the premises mortgaged..... 2-3
December 18, 1874, George W. Gage et ux. conveyed the mortgaged premises to W. F. Tucker..... 3-6
Gage died September 24, 1875..... 4
Leaving a will, making Sarah H. Gage, his wife, W. F. Tucker, Sr., executors of his will and also two of the guardians of his children..... 4
Mrs. Green acquires both mortgages..... 6
Bill of foreclosure by appellee November 27, 1875..... 4

W. F. Tucker died September 13, 1887, intestate, leaving heirs at law..... 3
Averments of the contents of the Green foreclosure..4, 5, 6, 7
Prayer for process in the Green foreclosure case..... 7
Summons in the same..... 8
Decree in the Green foreclosure suit, April 5, 1876..... 9
Taken pro confesso against Gage..... 9-10
Referred to master in chancery and report of same filed April 20, 1876, for $186,561; report confirmed on the same day and 100 days given to the heirs of Gage to pay the mortgage..... 10
No time given to Tucker to pay the mortgage..... 10
July 31, 1876, final decree of sale ordered..... 10
Master's report of sale January 2, 1877, sale made December 7, 1876, to the appellee of all the property..... 10
February 2, 1877, decree of confirmation, and order to the master to execute deed..... 10
Appellee still owner of whatever she acquired under the deed 10
25th day of January, 1890, heirs of Tucker convey to appellant all their right, title and interest..... 10
Widow of W. F. Tucker died in 1887..... 11
Bill represents that Tucker was owner in his own right of the property at the time of filing the bill, and at the time of sale. .....R. 6, Fol. 11
That he was not made a party defendant to the foreclosure proceedings, or ever appeared in court or subject to its orders.....R. 6, Fol. 11
That a decree had no binding force as to Tucker.R. 6, Fol. 11
That appellant is now in the actual possession and occupation of a portion of the premises—describing them.. R. 6, Fol. 11
That appellee is in the possession of the residue of the property and in receipt of the rents under her said decree.....R. 6, Fol. 12-13
That appellant offers to pay and tenders any amount of money, which in equity and good conscience the court shall decree to be owing to the appellee, upon a redemption of the premises.....R. 7, Fol. 13
Prayer for redemption.....R. 7, Fol. 14
Decree dismissing bill.....R. 21, Fol. 42
Contents of—in the Green-Gage foreclosure, same as recited in appellant's bill..... 11

Pleadings, prayer for process, subpoena and its service.. 11
Allegation in the bill that W. F. Tucker, Sr., was, at the time of filing bill of foreclosure, the owner in fee simple 11
Allegation not sufficient to make Tucker a party to the bill 11
Process — Prayer for, in Green vs. Gage..... 12
Directed to Sarah H. Gage and the other defendants hereinbefore named, commanding them, and each of them, etc.... 12
No one a defendant to a bill who is not named as such in the prayer for process..... 12
Authorities quoted.....12-16
— In Green vs. Gage..... 16
Subpoena Issues to Sarah H. Gage as the widow and executrix of G. W. Gage..... 16
W. F. Tucker as guardian, and W. F. Tucker as executor 16
Return of—By marshal..... 16
That he served the same upon Sarah H. Gage, personally, and upon W. F. Tucker, as executor, etc., and as guardian, etc..... 16
No service against Sarah H. Gage as executrix.....16-17
No service on W. F. Tucker, individually..... 17
Defendants should be made in bill, but not in the summons 17
If sought to be made in two capacities, bill should state so and pray process accordingly..... 17
Otherwise he will be held to be a party only in the character in which process is prayed against him..... 17
Authorities to sustain the same.....17, 18, 19

1.

—Case stated 19-21
Appellants Motion to dismiss the appeal for the want of jurisdiction 22
Grounds of—Because the judgment was entered on July 14, 1890;date of citation for the correction of the decree, July 7, 1892, and returned August 6, 1892, and record filed in the clerk's office of the Supreme court, September 17, 1892..... 22
That the jurisdiction of the court below is entirely dependent upon the fact of diversity of citizenship and the time within which to appeal had expired before the citation issued 22

Appellant contends that the case involves the construction or application of the constitution within the exception provided by Sec. 5 of Judiciary Act of March 3, 1891 22
Errors — Assignment of 22-23
The assignment of, shows that a Federal question is involved 22
Supreme court the only appellant court for the appellant. 22
United States Court of Appeals, no jurisdiction 22
Case of Green vs. Gage originally heard in United States Circuit court 23
Appellant's bill filed in the Circuit court of Cook county, and removed to the United States Circuit court where the original decree of foreclosure was had 23
Removal of the cause from state court only an indirect method of giving original jurisdiction to Federal court. 23
Secs. 4, 5, 6, and 14, of the Judiciary Act of March 3, 1891, discussed 23-24
Right of appeal discussed 26-28
Authorities quoted 26-28

II.

Decree of foreclosure in Green vs. Gage did not affect the rights of W. F. Tucker, Sr., as the grantee of the equity of redemption and before foreclosure proceedings were commenced, therefore, the appellant may now lawfully claim the equity of redemption 28
Parties interested in the premises, not served with process, not bound by a decree of foreclosure 28
Authorities quoted 28
Decree denying appellant under such circumstances to redeem, is to deprive him of his rights without due process of law 31
Pleadings and prayer for process in Green vs. Gage never put the equity of redemption of W. F. Tucker in issue. 32
W. F. Tucker was never made a party defendant in any capacity, never sued or served in his individual capacity 32
That appellee at the time of filing bill of foreclosure knew that W. F. Tucker held the legal title 32-33
Her duty to make him party if she desired to affect his rights 33

Finding of the court below, that W. F. Tucker, Sr., was a defendant solely in his representative capacity..... 33

Opinion .....R. 16, Fol. 32

That, though Tucker was before the court in his representative capacity, the bill contained sufficient averments to put him upon his answer as to his individual interests 33

Basis of this opinion—Executor of Walton vs. Herbert, 3d Green's Chan. Rep. (N. J.), 73; and Brasher vs. Van Cortland, 2d John. Chan. Rep., 242.....33-34

These cases criticised and distinguished....34, 35, 36, 39, 40

Tucker not named in the prayer for process in any capacity, and served with process only in his official capacity, and not appearing in any capacity, or submitted himself to the jurisdiction of the court, and therefore, cannot be bound in his individual capacity..... 36

Defendant sued officially, only represents the interest concerning which he is sued..... 36

Essential condition of res adjudicata is identity in the quality of capacity of the person for or against whom the claim is made.....36-37

Authorities sustaining this.....37-38

The rule, that if defendant is summoned generally he must, if he appears, object by exception or demurrer or the decree will bind him to the extent that it is supported by the averments of the bill..... 38

But where he is summoned specially in a representative capacity, he is before the court solely in the capacity in which he is sued..... 38

Authorities quoted .....38 et seq.

Decree in Green vs. Gage taken pro confesso..... 39

III.

The Supreme court holds that where it is claimed that a party has been served with process according to law and has, by the judgment of the court, been deprived of any property or legal right, upon investigation of the record, the court will determine the question as one affecting the provisions of the constitution of the United States 50

The court will examine the record to ascertain the

grounds for such an estoppel..... 51
Claim of appellee is, that in Green vs. Gage there is a decree against Tucker personally, although he is not named as a defendant in any capacity in the prayer for process, and he was not made a defendant, was not served in his individual capacity, and did not appear. .51-52
This is an evasion of Tucker's constitutional right to be brought into court by due process of law..... 52

IV.

The recitation in the record entry of default, that due and legal personal service had been had upon all the defendants defaulting must be controlled by the record, that Tucker was not a party defendant in any official capacity or personally; that that which appears of record affirmatively is not to be negatived by presumption 53
No presumption can be indulged in, that a party was duly served, in the absence of the record showing it, where the bill does not make a party defendant; it is only in cases where a defendant is defectively served in the first instance in a case where he is defendant; that a presumption will never arise that a subpoena or an alias issued at any time, against a party who was not a defendant 53
Authorities quoted.....53 et seq.
Recitals that the defendant was duly notified of such by service of process must be taken as well founded, unless contradicted by the record itself..... 55
Recitals do not bind as to service when the service shown by the record shows how the service was made..... 58
When the expression is general in the recital, that the parties appeared, etc., it will be intended that no one came, but he who had been made a party defendant and summoned, and that he came in the capacity in which he was summoned..... 57
Laches..... 68

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

CASE NO. 15,141. **TERM NO. 160.**

JOHN EVANS CORNELL, *Appellant,*

vs.

HETTIE H. R. GREEN, *Appellee.*

BRIEF AND ARGUMENT FOR APPELLANT

BY

ROBERT RAE.

INTRODUCTION.

This appeal is taken from the decree of the Circuit court of the United States for the Northern district of Illinois, entered on the 14th day of July, in the July term of the said Circuit court, 1890, and appealed on the 7th day of July, 1892.

The case is now before this court on final hearing, and on a motion to dismiss the appeal.

STATEMENT.

The appellant in this case filed his bill in the Circuit court of Cook county, State of Illinois, as owner of the premises in question, to redeem from two certain mortgages hereinafter described, held by the appellee upon the same.

On the 22d day of July, 1871, one George W. Gage was the owner in fee simple of the real estate hereinafter described. On July 22, 1871, he borrowed fifty thousand ($50,000) dollars from the Traveler's Insurance Company of Connecticut, to secure the payment of which, with interest at the rate of nine (9) per centum per annum, he executed his bond to the insurance company in the penal sum of sixty thousand ($60,000) dollars, and also executed, with his wife, a trust deed, dated on the 22d day of July, 1871, in which he conveyed the premises to Julius White, as trustee, to secure the payment of the bond.

On the 7th day of May, 1873, George W. Gage, together with David A. Gage and John A. Rice, executed and delivered to Hettie H. R. Green, appellee herein, their note in the sum of one hundred thousand ($100,000) dollars, with interest at the rate of ten (10) per centum per annum; also six (6) interest coupon notes for the sum of five thousand ($5,000) dollars each; and to secure the payment of the notes, George W. Gage, his wife, Sarah H. Gage, joining with him, executed and delivered to Benjamin E. Gallup, trustee, with Francis B. Peabody, as successor in trust, a trust deed dated May 7, 1873, and filed for record May 17, 1873, in the recorder's office in Cook county, State of Illinois, whereby Gage conveyed

to Gallup, as trustee, to secure the note of one hundred thousand ($100,000) dollars and interest, the following described property:

Lot five (5) in block thirteen (13) in fractional section fifteen (15), addition to Chicago; also lots one (1), four (4), five (5), eight (8), nine (9), twelve (12), thirteen (13), sixteen (16) and seventeen (17) in block three (3) in Egandale, being a subdivision of the east one hundred and eighteen (118) acres of the south-west quarter of section thirteen (13), township thirty-eight (38) north, range fourteen (14); also the south half of section thirteen (13), township thirty-eight (38), north, range thirteen (13); also the south fifty (50) acres of the east half of the north-west quarter of section thirteen (13) township thirty-eight (38) north, range thirteen (13); all east of the third principal meridian, in the County of Cook, State of Illinois; and including the property mortgaged by trust deed delivered to Julius White, trustee, on July 22, 1871.

By warranty deed, dated December 18, 1874, and thereafter recorded in the recorder's office of Cook county, George W. Gage, and his wife, Sarah H. Gage, for a valuable consideration, conveyed all the property last hereinbefore described to one William F. Tucker.

George W. Gage died on or about the 24th day of September, 1875. William F. Tucker, his grantee as aforesaid, departed this life the 13th day of September, A. D. 1887, intestate, leaving as survivors his wife, Phœbe Tucker, and three children, William F. Tucker, Jr., Annie G. Wilder, and Jennie T. Johnson, all above the age of twenty-one years at the time of their father's death.

It seems that by his last will and testament, George W. Gage had (with his wife as executrix), made William F. Tucker Sr., his executor, and also one of the guardians of his minor children (George W. Gage Jr., and David A. Gage), together with Joseph K. Barry and John W. Clapp.

Hettie H. R. Green, appellee, purchased the bond given by George W. Gage, to the Traveler's Insurance Company, of Connecticut, and on November 27, 1875, filed her bill in the office of the clerk of the Circuit court of the United States for the Northern District of Illinois, to foreclose both the trust deeds heretofore described. The pertinent allegations of appellee's bill, in her foreclosure suit, were as follows (Rec., 24; Fol. 48):

" Your oratrix, Hettie H. R. Green, who is a resident " of Meadows Falls, State of Vermont, and a citizen of " the last named state, brings this, her bill of complaint, " against Sarah H. Gage, a resident of the city of Chi- " cago, and a citizen of the State of Illinois, and widow " of the late George W. Gage, of Chicago, deceased, and " executrix of his last will and testament; Eva Gage, " Mary B. Gage, Carrie E. S. Gage, Alice Gage, George " W. Gage, Jr., and David A. Gage, children of the said " George W. Gage, deceased, each of the said children " being now residents of the city of Chicago, and citizens " of the State of Illinois; the said two last named chil- " dren, George W. Gage, Jr., and David A. Gage being " minors, *William F. Tucker, Joseph K. Barry and John* " *W. Clapp, all of whom are residents of the county of* " *Cook, State of Illinois, and citizens of the last named* " *state, and guardians of the said minor children, and the* " *said William F. Tucker, being also one of the execu-*

" *tors of the last will and testament of the said George*
" *W. Gage, deceased;* Louis L. Coburn, a resident of
" Chicago, and citizen of the State of Illinois, also one
" of the executors of the last will and testament of the said
" George W. Gage, deceased; also David A. Gage and
" John A. Rice, of the city of Chicago, each of whom is
" a citizen of the State of Illinois, Benjamin E. Gallup,
" Francis B. Peabody and George S. Paddock, residents
" of the city of Chicago, each of whom is a citizen of
" the State of Illinois, also John N. Jewett and Charles
" T. Adams, residents of the city of Chicago and citi-
" zens of the State of Illinois; the Thayer & Tobey Fur-
" niture Company, a corporation organized under the
" laws of the State of Illinois, and doing business in the
" said city of Chicago; Julius White and Jonathan Good-
" win, Jr., residents of the county of Cook aforesaid,
" and citizens of the State of Illinois (also making ten
" other parties defendants, but no mention of Tucker,
" and then proceeds), all which persons and corporation
" aforenamed are made defendants herein; also the follow-
" ing named persons and corporations (naming sixteen
" others, but not mentioning Tucker) each of whom your
" oratrix asks may be made parties to the bill."

(The bill then recites the execution of the one hundred thousand ($100,000) dollar note and trust deed to Benjamin E. Gallup, and default, and it then recites the execution by Gage of the fifty thousand ($50,000) dollar note to the Travelers' Insurance Company, and the trust deed to White, trustee, and Jonathan Goodwin, Jr., successor in trust, and the purchase by oratrix of the said note and the default; also the death of Gage September 14, 1875, and mentioning his children as defendants.)

The bill then recites as follows: " Leaving a last will

" and testament, in and by which he appointed the said
" *William F. Tucker, Louis L. Coburn and his said*
" *widow as executors and executrix* and devised to them
" upon certain conditions therein named all of his real
" estate. The bill then avers that the said Gage having
" before that time, as appeared by the records in said re-
" corder's office, *by deed executed by himself and wife,*
" *dated December 18, 1874, and recorded in said record-*
" *er's office December 19, 1874, for the consideration as*
" *expressed in said deed of twenty-four thousand*
" *($24,000) dollars conveyed to said Tucker all said*
" *premises herein described, subject to said incum-*
" *brances.*"

" Your oratrix further shows that the said above-named
" parties against whom this bill of complaint is brought,
" have, or claim to have, some interest in the said prem-
" ises described in said trust deed by mortgage, judg-
" ment, conveyance or otherwise; but your oratrix states
" that these interests, whatever they are, are subject to
" the rights of your oratrix, under her securities before
" mentioned, and cannot be set up against the same or
" in anyway interfere therewith."

After reciting how much is due, the bill proceeds:

" To the end, therefore, that the amount due your
" oratrix, under, upon and by virtue of said securities
" now owned and held by her as aforesaid, and for ad-
" vances made by her as aforesaid, and such advances as
" she may hereafter make under said deeds for taxes, as-
" sessments or otherwise, be correctly ascertained and
" fixed; that she have a decree for the same directing the
" same to be paid to her by some date to be named
" therein, and then in the event of non-payment on or

" before that date, that said premises be sold to pay the " same, according to the rules of equity and the practice " of this court, and that the purchaser or purchasers at " such sale be put in possession of that portion of the " premises purchased by them respectively, and that your " oratrix, her agent or attorney, for and on her behalf, " may have the right to bid and become the purchaser at " said sale, and that if necessary a receiver may be ap- " pointed at any time during the pending of this suit to " take charge of said premises and to receive the rents " and profits of the same according to the rules and " practice of this court.

" Your oratrix asks the aid of this honorable court, " and for such other and further relief as to equity and " good conscience may seem fit and proper : "

May it please your Honors to grant to your oratrix a writ of summons issued out of and under the seal of this honorable court, according to the rules and practice of said court, directed to the said Sarah H. Gage and the other defendants hereinbefore named, commanding them and each of them by a certain day, etc.

Upon this bill a chancery subpœna was issued from the United States Circuit court for the Northern District of Illinois, dated November 27, 1875, and filed January 6, 1876, which is in part as follows (Rec., 53, Folio 103):

THE UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

UNITED STATES OF AMERICA.

To Sarah H. Gage, widow of the late George W. Gage, deceased, and executor of his will, Eva Gage, Mary E. Gage, Carrie E. S. Gage, Alice Gage, George W. Gage, Jr., and David A. Gage, children of the said George W. Gage, deceased, William F. Tucker, Joseph K. Barry and John W. Clapp, *Guardians*, William F. Tucker, *Executor*, Louis L. Coburn (followed by other names), all of whom are commanded to appear on the first Monday in January next, etc.

Upon the back of this subpœna there is an endorsement of service by the marshal as follows (Rec., 53, Folio 105):

"I have served the annexed writ by personally deliv-
"ering a true and correct copy thereof to each of the
"following named defendants, upon the days set opposite
"to their names: Upon William F. Mulligan, Monroe
"Heath, Bradford Hancock, Joseph K. Barry, John W.
"Clapp, Louis L. Coburn, Jonathan Goodwin, Jr., John
"B. Adams, Clark Sipe, David A. Gage, Julius White,
"and upon *Willian F. Tucker as Guardian*, and *Wil-*
"*liam F. Tucker as Executor*, on the 8th day of De-
"cember, 1875."

An *alias* chancery subpœna, dated January 12, 1876, and filed February 9, 1876, returnable on the first Monday of February, 1876, was issued and directed to Charles M. Smith, *et al.*, (wherein was not included the said Tucker in any capacity) impleaded with Sarah H. Gage *et al.* It was returned by the marshal "defendants not

" served." A *pluries* chancery subpœna dated February 12, 1876, made returnable the first Monday in March, 1876, filed in the office of the clerk of the Circuit court, March 2, 1876, was directed to Charles M. Smith and August Shiffer, impleaded with Sarah H. Gage *et al.*, and was returned as having been served on Shiffer, February 15, 1876, and on Charles M. Smith February 12, 1876.

The first Monday of the April term of the Circuit court for 1876 was on the third day of that month. On April 5, 1876, the following order was entered in the foreclosure suit (Rec., 71; Fol. 141): " And it ap-
" pearing that due and legal personal service had
" been had upon all the other remaining defendants in
" this cause, by service of subpœna in this cause
" upon them respectively, and that each and all of
" the defendants in this cause are now legally before
" this court and submit to its jurisdiction, and that neither
" of the said defendants have pleaded, answered or de-
" murred therein, except the following named defend-
" ants, naming them (not including Tucker in any ca-
" pacity) the minors answering by guardians *ad litem* to her
" than Tucker." The order then proceeds as follows:
" On motion of complainant's solicitor it is ordered that
" each and all of the said defendants, who have not
" pleaded, answered or demurred as aforesaid, namely
" (then naming the widow and children of George W.
" Gage, William F. Tucker and others) to plead, answer
" or demur to the bill of complaint in this cause in-
" stanter, and said last named defendants having all been
" three times called so to do, come not but make de-
" fault, and it is hereby ordered, adjudged and decreed
" that as to each of said defendants last named, and who
" make default as aforesaid, said bill of complaint and

" the matters and things therein contained be taken as " to have been confessed."

The cause was then referred to the master to take proofs and report the amount due, etc. His report was filed April 20, 1876, finding $186,561 as due, and it was confirmed April 20, 1876, and 100 days, or ten days longer than the life of a common law execution, was given the heirs of Gage to pay this large amount. On July 31, 1876, the final decree of sale was ordered. The master's report of sale was filed January 2, 1877, and shows that the sale was made December 7, 1876, to the appellee, Hettie H. R. Green, of all the property heretofore described. February 2, 1877, a decree was entered confirming the sale and ordering the master to execute a deed, which was done and delivered to the appellee on the 3d day of July, 1877. And the appellee still retains whatever interest she acquired by virtue of said deed.

At the time of the proceedings in foreclosure against the property in question, it was owned in his own right by William F. Tucker, Sr., who died the 13th day of September, A. D. 1887. William F. Tucker, Sr., left him surviving, as heirs-at-law, above the age of twenty-one years, his children, William F. Tucker, Jr., Annie G. Wilder and Jennie T. Johnson. By good and sufficient deed, dated the 25th day of January, 1890, and recorded in the recorder's office of Cook county on the 27th day of March, 1890, William F. Tucker, Jr., and Mary L. Tucker, his wife, conveyed to appellant all the property conveyed by the said two trust deeds executed by George W. Gage; and that Annie G. Wilder, with her husband, Thomas E. Wilder, and Jennie T. Johnson, a widow, by good and sufficient deed dated the 15th day of February, 1890, and recorded in the recorder's office

of Cook county, on the 27th day of March, 1890, also conveyed to appellant all of the property conveyed by the two trust deeds executed by Gage, by which two deeds the appellant became the absolute owner in fee simple of all the property subject to the two trust deeds. Phœbe Tucker, widow of William F. Tucker, Sr., died in 1887, after the death of her husband, William F. Tucker, Sr.

Green v. *Gage, et al.*

THE PLEADINGS, PRAYER FOR PROCESS, SUBPŒNA AND ITS SERVICE.

The introductory part of the bill evidently intended to make Sarah H. Gage, the widow, and William F. Tucker, executor and guardian, defendants in their official capacity. (Rec., 24, fol. 48.)

Hid in the very center of the bill is an allegation that William F. Tucker was at the time of the filing of the bill, the owner in fee simple as the grantee of George W. Gage, deceased, of the premises sought to be affected by the decree of foreclosure. (Rec., 34, fol. 68.) This last allegation is neither sufficient to make a party a party in interest, nor a defendant.

Lord Chancellor PARKER, in the case of *Fox* v. *Pratt*, 1 P. Wms., 593, says: "The plaintiff may complain "and tell stories of whom he pleases, but they only are "defendants *against whom process is prayed*, and no "process being prayed against the assignees, they still "are not defendants. Consequently the plea is good."

The plea referred to, was that the plaintiff being a bankrupt, that the assignees ought to have been made a party. The same case was referred to in 2nd Eq. Ca. Ab., 1 pl. 3, 723, pl. 1.

Cook vs. Darsey 38 W.V. 178

In ~~Hunt v. Watson~~ (35 ~~W. Va.~~, ~~36~~), it was said: "No "matter that the process names certain parties, as de- "fendants. The bill must have parties for it is the "basis on which the structure of the suit rests, and "on which the matters of the suit become *res judi-* "*cata*. A person may be named in and ~~sued~~ served with pro- "cess, yet he is not a party unless named in the bill; "and not only named in it, but there must be allegations "relating to him, showing why he is a party, what mat- "ters touch or concern him, involved and to be decreed "upon in the suit (quoting many authorities). And, "although a man be named in the bill, simply in narra- "tion of its facts, and it contain matter touching him, "and he be made a party in the process, yet if he be "not made a party to the bill, the bill would be bad *and* "*the decree null.* In other words, he must be a party "to the process, a party to the bill, and a bill must al- "lege matters touching him, so far as it seeks to affect "him; the observance of these *fundamental rules* is all "important in process, as a departure from them ren- "ders the decree not only erroneous, but generally void" "as inspection of cases above cited will show;" ~~quoted with approval in Cook v. Darsey, 38 W. V., 198.~~

Harris vs Carter
3 Stewart 333 Note 4.
1 Daniels Chan Pr. 289.
Anderson vs Wilson
100 Ind 402

Prayer for Process.

Rec., 36, fol. 70.

The prayer for process is:

"May it please your Honors to grant to your oratrix "a writ of summons, issued out of and under the seal of "this honorable court, according to the rules and prac- "tice of said court, directed to the said Sarah H. Gage "and the other defendants hereinbefore named, com- "manding them and each of them," etc.

From the earliest times in the history of chancery practice in the High Court of Chancery in England, no one was the defendant to a bill in equity who was not named specially in the prayer for process.

Mr. Daniels, in his Sixth American Edition of Pleading and Practice, Vol. 1, page 390, under the title of "Prayer for Process," says: "The draftsman, however, "generally writes a direction in the margin of the draft, "for the insertion of this prayer, specifying the names "of the persons against whom process is to be prayed, "and care must be taken in so doing to insert the names "of all the persons who are intended to be made de- "fendants; because it has been held that the mere "naming of a party in a bill, without praying process "against him *as a defendant* is not to be considered as "making him a party even where he is out of the juris- "diction of the court."

Mr. Justice Story, in his Equity Pleadings, 9th Ed., Sec. 44, says: "The ninth part of the bill is the prayer "of process, to compel the defendant to appear and "answer the bill, and abide the determination of the "court on the subject. Care must be taken in this

" part of the bill to insert *the names of all persons* who " are intended to be parties, for it is a general rule that " none are parties, although named in the bill, against " whom process *is not prayed*," quoting

1st Cooper's Eq. Pl., 16.
Fox v. *Fratt*, 1 Pr. Wms., 593.
Windsor v. *Windsor*, 2 Dick., 707.
Brasher v. *Van Cortlandt*, 2 John. Ch., 245.
Brookes v. *Burt*, 1 Beav., 106, 107.
1 Smith Ch. Pr., 45.
Mitf. Eq. Pl., by Jeremy, 164, 165.

In the case of *Windsor* v. *Windsor*, *supra*, which was decided in 1788 by Lord Kenyon, Master of Rolls, it is said, " The naming of a party in a bill as defendant and " not praying process against him, is not to be consid- " ered as making him a party."

We deem it important to refer the court to these decisions in the High Court of Chancery in England, because by the 90th Rule of this Court the practice in chancery of the Circuit Courts is regulated by its practice.

Miss. Mills et al. v. *Cohen et al.*, 150 U. S., 202.
Burns v. *Heath*, 12 How., 168;
Wheeling Bridge Case, 13 How., 518.

In *Verplanck* v. *Mercantile Ins.*, 2 Paige Ch. Rep., Chancellor Egden Edwards says, " It is well settled that " no persons are parties as defendants in a bill in chan- " cery, except those against whom process is prayed."

In the case of *Elmendorf et ux.* v. *Delancey*, the Chancellor said: " This bill has no prayer for process; and " according to the strictness of English forms it would be

" fatal for that reason." He then explains why at that time (in 1825) it was not necessary in the State of New York, in a bill filed in chancery in its courts, to have a prayer for formal process, but it is necessary even under this liberal practice that every bill should clearly display the persons who are impleaded as defendants. He says: " Parties are the essence of every suit, and it is essential " that the parties, complainant and defendant, should " be clearly presented as such. When it is un- " certain who are complainants, or who are the persons " called to answer, the suit is fundamentally defective. " And if the parties are not clearly designated it is the " fault of him who institutes the suit." In this case he was speaking of the New York Chancery practice at the date at which the case of *Brasher* v. *Van Cortlandt*, 2 John., Chy. R., 242, was decided, and which was relied upon by Judge Blodgett to establish the doctrine, that where a person is summoned generally, they are also, in their official capacity. (Rec., 19, fol. 37, 38.)

In the case of *Houston* v. *McClarty's Heirs*, 3 Litt. (Ky.), 274, it is said: " Praying that the heirs may be " made defendants without taking out process against " them, *or naming them in the bill*, is not making them " defendants. The bill ought to be dismissed."

In the case of *Hoyle* v. *Moore*, 4 Ired. Eq. (N. C.), p. 175, the prayer for process is, *that the proper parties be made defendants*, and if there are others than those set forth, that they be made parties, etc. That the clerk may be ordered to issue his state's writ of subpœna to the proper defendants, etc. The court says: " In order to obtain " the answer upon oath, the bill must pray that the writ " of subpœna issue to the defendant, and although per- " sons may be named in the bill, *none are defendants to*

"*it against whom process is not prayed.* The defend-
"ant is as necessary to the just and proper construction in
"a bill in equity as a plaintiff. In the case we are now
"considering there is no defendant whatever—process is
"prayed against no one. * * * It is not, as before
"remarked, sufficient that the names of individuals are
"contained in the bill. Process is not asked against
"them, nor against any one in particular. There is,
"then, *no party defendant* to the bill. The court has
"gone very far in sustaining bills defectively drawn—but
"we think this so essentially wanting in one of the points,
"necessary to the institution of a suit in any court, that
"we cannot sustain it."

In some of the states, growing out of the liberal and loose spirit which code-practice so defectively educates, a rule which requires the prayer for process to identify the parties, does not make a bill fatally defective if it is omitted, when the complaint shows who the defendants are.

Sheridan v. *Cameron*, 65 Mich., 680.

But in the federal courts it is a fatal defect, under Rule 23 in chancery of the Supreme Court of the United States, promulgated under an act of Congress, and having, therefore the force of such, to omit from the prayer for process the names of the defendants given in the introductory part of the bill.

Goebel v. *American Ry. Supply Co.*, 55 Fed. Rep., 825.

Carlsbad v. *Tibbetts*, 51 *id.*, 852.

In the latter case, notwithstanding the defendant appeared, the court dismissed the bill on its own motion, remarking: "The bill in this case contains no proper

"prayer for subpœna as required by the rules of the Su-
"preme court." In this case the prayer was similar to
the one at bar.*

Cassiday
vs
Knapp
16 Pa. St. 307
Dunlop
vs
Hague
33 Atlantic
Repr. 554

From these citations it must be plain, under the law of the United States courts, one in which this bill was filed, that none are parties to a bill as defendants who are not named in the prayer for process; and it is not sufficient that their names be given in the introductory part of the bill. This prayer for process, in the case at bar, is to Sarah H. Gage alone and in her individual capacity. The capacity in which she had no interest, having prior, as the bill shows, to its filing, united with her husband in a deed for the mortgaged premises to William F. Tucker, so that the bill stands without any defendant having any interest in the subject-matter of the suit.

THE SUBPŒNA.

(Rec., 53, Fol. 103.)

Curiously enough the summons issues to Sarah H. Gage as the widow of the late George W. Gage, deceased, and executrix of his will, and against William F. Tucker, guardian, and William F. Tucker, executor, and the return of the summons by the marshal is (Rec., 54, fol. 105), that he served the same upon Sarah H. Gage personally, who as widow had no personal interest, having, as the bill alleges, conveyed her interest to Tucker prior to the filing of the bill, and upon the children of Sarah Gage, by leaving a copy with their mother, so that we have a service upon the heirs of George W. Gage, deceased, who are not made parties defendant, by leaving a copy with their mother, and a service upon William F. Tucker as executor and guardian of the children, who is also not made defendant, but no service upon Sarah

* Rule 23. "The prayer for process of subpœna in the bill shall contain the names of all the defendants named in the introductory part of the bill."

H. Gage as executrix, who was not made defendant as such, nor William F. Tucker in his individual capacity.

It is stated in the case of *Carter* v. *Ingraham*, 43 Ala., 78, that "where it is sought to make a defendant a "party in more than one character, it should be so stated. "If a defendant in a chancery suit is sought to be made "a party in his own right, as heir at law, and as execu- "tor or administrator, the bill should state the fact "and pray process against him in both characters; "otherwise he would be held to be a party only in the "character in which process is prayed against him." This case is hereafter quoted, and the court, in referring to this branch of the case, says: "Besides, "*no process is prayed against him as executor*; true the "summons in the nature of a subpœna, was issued against "him as heir at law, and as executor, but this does not "help the matter, as the register had no authority to is- "sue such a summons; he should have followed the "prayer of the bill. Nor does the answer filed by him "cure the defect, for he does not answer as executor, but "as I. W. Carter merely. He is, therefore, not a party "defendant to the bill in such a manner as to authorize "any decree against him in that character."

1 Daniel Chy. Pr., 6th Ed., No. 193.

Leggott v. *Gr. Northern Ry. Co.*, 1 Q. B. Div. (Law Rep.), page 604.

The decree is said to be a matter of solemn record; yet one cannot help being provoked into a smile with these facts before him; want of parties and a want of service, when we read in the decree, (Rec., 71, fol. 141): that "due and legal personal service has been had upon all "the other remaining defendants in this case (not naming "them) by service of subpœna in this cause upon them

"respectively, and that each and all of the defendants in "this case are now legally before this court and subject "to its jurisdiction, and that neither of said defendants "have pleaded, answered or demurred therein, except "the following (but not naming Sarah H. Gage or Will- "iam F. Tucker) said last mentioned defendants, hav- "ing each been three times called so to do (that is, "to plead, answer or demur) come not, but make default, "and it is hereby ordered, adjudged and decreed that as to "each of the said defendants last named, so making de- "fault as aforesaid, said bill of complaint and the mat- "ters and things therein contained be taken as and for con- "fessed." It was quite natural and proper that these defendants, not named in the prayer for process, and not served with process, could not be found when called, and as a consequence did not come because not invited; but whether they made default or not by so doing, or by non-appearance in a case where they were not summoned, and confessed the matters and things contained in the bill, is quite another question.

A decree so erroneous for want of parties might possibly have been dismissed on the motion of the appellant in this case for want of proper parties, and on the ground that Tucker, his grantee, was not a party to the action, and the court had no jurisdiction.

People v. *Mullan*, 65 Cal., 396.

Follows Evans 20 Fed 210

In this case it was decided that a transfer made after the entry of judgment, a grantee may move to vacate the judgment on the grounds that it is void, because it was not served on defendant, the grantor. This case quotes, for support of the ruling, the case of *United States* v. *Patterson* (15 How., 12). It is quoted with

approbation in Freeman on Judgments, Sec. 92; * * * " and such a judgment, void for want of jurisdiction " over the person of the defendant, may be vacated on " motion, irrespective of lapse of time."

Freeman on Judgments, Sec. 98, says: " Judgment without service is a denial of due process of law."

Freeman on Judgments, Sec. 98; quoting *Balcher* v. *Chamber*, 53 Cal., 635.

The better rule, however, would seem to be, to file just such a bill as is filed in this case, because the appellee, who was complainant in the bill of foreclosure, is in possession of the profitable portions of the land, either under the decree, or the right of entry under the mortgage; and complainant in this bill can not ask to have the cloud removed unless upon tender of the amount due to the appellee, whatever that may be.

These points are made preliminary to the statement of the appellant's case, and in order that the court may be in full possession of the effect of the foreclosure proceedings, pleadings, prayer of process and summons, before considering the principal question in the case, whether William F. Tucker's grantee, the appellant, was properly barred in the court below from his right of redemption for want of process against Tucker.

Appellant's Case.

The appellant filed his bill in this cause in the Circuit court of Cook county, State of Illinois, on the 4th day of April, 1890, and on that day summons was duly issued by the clerk against Hettie H. R. Green, Benjamin E. Gallup, Charles White, Laura E. Young, G. C. Peterson, Joseph Dow and John Katzke, which process was duly

served upon all the defendants. The cause was removed to the United States Circuit court on the 21st day of April, 1890. The appellee, on the 26th day of May, 1890, filed in the clerk's office of the United States Circuit court her demurrer to the appellant's bill of complaint.

The demurrer was argued on the 30th day of June, 1890, which was sustained by the Circuit Judge, and the bill dismissed for want of equity at the complainant's cost. His opinion was based mainly on the ground that Wm. F. Tucker, Sr. (though officially sued and served), was sufficiently before the court in the foreclosure proceeding to be personally bound by the decree of sale therein made. He said: "It seems to me quite clear "that Tucker, having been served with process in *his* "*representative capacities*, was chargeable with notice "of the entire contents of the bill, so far as it affected "him in his representative or his individual capacity." Further on he remarked: "The record entry of the de- "fault also recites that all the parties defaulting, among "whom was Tucker, had been duly served with process, "and as there was ample time between the issue and re- "turn of the summons served on Tucker in his repre- "sentative capacity, and the time default was taken at the "April term, 1876, for the issue of an *alias*—or *pluries*— "summons and service upon Tucker individually, the "court will, I think, presume that such service was ob- "tained as is recited in the order of the court." He also intimated "that the bill should not be sustained on the "ground of the laches of Wm. F. Tucker," but said, however, "I choose to place my decision in the case "upon the ground that Tucker was sufficiently before the "court in the foreclosure proceedings to be personally "bound." (Rec., p. 16, fol. 32.)

The cause was docketed in the United States Circuit court May 3, 1890, as No. 21,630. A decree was entered on July 14, 1890, sustaining the demurrer of the appellee. The citation to show cause why the decree should not be corrected, was issued on July 7, 1892. The cause was docketed and the record filed in the office of the clerk of the Supreme court of the United States September 17, 1892, the appellee having retained the record until that time. (Affidavit on file.) It thus appears that the appeal was taken after July 1, 1891.

A motion is now made to dismiss this appeal for want of jurisdiction, because the appeal was taken after July 1, 1891.

Thus, at the threshold, we are confronted by a motion to dismiss the appeal, which is based on the judiciary act of March 3, 1891, 26 Stat., C. 517, pp. 826, 827. In making this motion the appellee assumes that the jurisdiction of the United States Circuit court in this case "is "dependent entirely upon the fact that the opposite par- "ties to this suit are citizens of different states," and that the time, therefore, within which to take an appeal to this court from the judgment or decree of the United States Circuit court for the Northern district of Illinois had expired July 1, 1891, before the citation to show cause why the decree should not be corrected was issued.

ARGUMENT.

I.

WE CONTEND THAT THE MOTION TO DISMISS THIS APPEAL MUST BE DENIED, BECAUSE THE JURISDICTION OF THE CIRCUIT COURT IN THIS CASE DID NOT DEPEND ENTIRELY UPON THE FACT THAT THE OPPOSITE PARTIES TO THIS SUIT WERE CITIZENS OF DIFFERENT STATES. THE CASE INVOLVES "THE CONSTRUCTION OR APPLICATION OF "THE CONSTITUTION OF THE UNITED STATES," AND THEREFORE WITHIN THE EXCEPTIONS PROVIDED BY SECTION 5 OF THE JUDICIARY ACT OF MARCH 3, 1891.

The appellant has assigned as errors:

"1. That the court erred in refusing to grant the "prayer of the complainant, as prayed in his bill of com- "plaint.

"2. That the court erred in refusing to grant so "much of the prayer of said bill of complaint in which it "is asked that he be decreed the right to redeem his "said lands mentioned in the said bill, from the mort- "gage debt due to Hettie H. R. Green, the appellee.

"3. That the court erred in holding that William F. "Tucker, the grantor of the land mentioned in said bill "of complaint, was barred of his equity of redemption "by reason of the foreclosure proceedings had by the bill "filed in the United States Circuit court for the North- "ern district of Illinois, in the month of November, 1875, "in the case in which Sarah H. Gage, William F. "Tucker, *executor and guardian*, and others, were it is "claimed made defendants, the said Tucker never hav- "ing been personally sued or served with process, or in

" any way submitted himself to the jurisdiction of said " court, and that said finding deprived said complainant " of his property ' without due process of law.' "

The error last assigned characterizes the two preceding assignments, thus making a case that involves the " con- " struction or application of the constitution of the United " States" as to whether William F. Tucker, Sr., was deprived of his property " without due process of law."

It is worthy of particular observation, at the outset, that the foreclosure proceedings in *Green* v. *Gage*, were had in the United States Circuit court for redemption and therefore ought to be governed by the laws of that *forum*. The bill filed by appellant was filed in the Circuit court of Cook county, and was removed by appropriate proceedings by the appellee to the United States Circuit court where the original decree of foreclosure and that the removal of a cause from the state court is only an indirect method of giving original jurisdiction to the Federal Circuit courts. Therefore, if this exalted tribunal is to be denied a review of the case at bar, when the construction or application of the constitution of the United States is involved, on account of the court getting jurisdiction by removal from a State court and not by summons, we are *vis a vis* with a strange condition of judicial affairs.

Section 4 of the Judiciary Act of March 3, 1891 (26 Stat. C. 517, pp. 826, 827), provides " That no appeal, " whether by writ of error or otherwise, shall hereafter " be taken or allowed from any District court to the ex- " isting Circuit court, and no appellate jurisdiction shall " hereafter be exercised or allowed by said existing Cir- " cuit courts, but all appeals by writ of error or other- " wise from said District court shall only be subject to " review in the Supreme court of the United States, or in " the Circuit court of Appeals hereby established, as is

" hereinafter provided, and the review, by appeal, by " writ of error, or otherwise, from the existing Circuit " courts shall be had only in the Supreme court of the " United States or in the Circuit courts of Appeals, " hereby established, according to the provision of this " act regulating the same."

By section 14 of that act, Section 691 of the Revised Statutes of the United States, and Section 3 of the Act of February 16, 1875 (see 77, 18 Stat., 316), and "All " acts or parts of acts relating to appeals or writs of er- " ror, inconsistent, with the provisions for review by ap- " peals of writs of error in the preceding Sections 5 and " 6 of this act are hereby repealed."

By Section 5 it is provided "That appeals or writs of " error may be taken from the District courts or from the " existing Circuit courts direct to the Supreme court in " any case in which the jurisdiction of the court is in " issue; from the final sentences and decree in prize " causes; in cases of a conviction of a capital or other- " wise infamous crime; *in any case that involves the con-* " *struction or application of the constitution of the United* " *States;* in any case in which the constitutionality of any " law of the United States, or the validity or construction " of any treaty made under its authority, is drawn in " question; and in any case in which the constitution or " law of a state is claimed to be in contravention of the " law of the United States. But nothing in the act was " to effect the jurisdiction of the Supreme court in cases " appealed from the highest court of a State. nor the con- " struction of the statute providing for a review of such " cases."

It has been said of the Appellate Court Act, at least, with great apparent force, that an examination of sec-

tions 5 and 6, "in connection with the last sentence of "section 14, leaves little doubt that it was the intention "of Congress to repeal all statutes providing for a review "of the judgments and decrees of Federal, Circuit and "District courts by the United States Supreme court, by "means of an appeal or writ of error, except in the classes "of cases mentioned in sections 5 and 6, and except pos- "sibly in a few exceptional classes of cases in which the "United States is a party."

The fifth article of the first twelve amendments to the constitution of the United States provides: "That no "person shall be deprived of life, liberty or property "without due process of law." This amendment simply declares the great common law principle as to personal rights, applicable to both State and Federal governments. The right to life includes the right to the body, in its completeness, without dismemberment; to liberty—the right to exercise the faculties and full lawful functions; to property—the right to acquire, possess and enjoy it, in any way consistent with the equal rights of others, and the just demands of the state. The right to acquire, hold and enjoy property is a guarantee of fundamental law.

Has the appellant been deprived of his property without due process of law? It has been said by this court that "due process of law means such an exertion of the powers "of government as the settled maxims of the law permit "and sanction. It requires that a person shall be "brought into court, and have an opportunity to prove "any fact for his protection. It means law in its regular "course to determine every means of justice—a timely "and regular proceeding to judgment and execution. It "implies and includes parties, judge, regular allegations

"and a trial according to some settled course of judicial "proceedings. Therefore, if the appellant has been de- "prived of his property by a judicial proceeding to which "he was not a party in his individual capacity, he has "been deprived of his property "without due process of "law."

A Post 27.

Most of the litigation in the Circuit courts of the United States is dependent for its jurisdiction upon diversity of citizenship. To hold, then, that in all cases removed from the state courts because of diversity of citizenship, regardless of whether the construction or application of the constitution of the United States is involved, no appeal could be taken to this court, would deprive the Supreme court of the United States of a substantial proportion of its authority, and if true, this court would "hold but a barren scepter in its hand" to interpret the constitution and the laws made in pursuance thereof over a large *corpus* of litigation decided in the United States Circuit courts.*

Again, if this motion should be granted, would it not present a judicial anomoly? Suppose a suit had been commenced in a state court, involving the construction or application of the constitution of the United States, and that this suit should be eventually appealed to the Supreme court of the state, from this a writ of error would lie to the Supreme court of that state from the Supreme court of the United States. Suppose, however, that the suit had been removed from a state court to a United States Circuit court, on the ground of a diversity of citizenship, is there no appeal to this court under like condition from the Federal Circuit courts?* But if the con-

*A removal to the Federal court places the cause so removed on the same footing as a suit originally commenced in the United States courts, and from which an appeal to this court would, in a case involving a question of constitutional construction, undoubtedly lie.

* If Supreme Court has not jurisdiction, — no jurisdiction
McFeely vs Ross 141 U.S. 661
The Alliance 70 Fed Rep 274
Green vs Mills 69 Fed Rep 852.

tention of appellee is correct, one of the parties would by the act of the other, be deprived of his right (as also to have the public's right, to have the constitution interpreted by the most exalted forum in the republic), to have this tribunal pass upon the constitutional question that might be involved.

None of the cases cited by appellee in her brief in support of this motion to dismiss, involved any of the six classes of cases specified in section 5 of the Judiciary act of March 3, 1891,—excepted from its operation as to the new courts of appeal.

No case cited by counsel for appellee in support of her motion to dismiss in this court, is a case commenced in a state court, and in which a federal question could have been raised, either in the state court or where by diversity of citizenship, it was removed to a federal court.

Cin. Safe & L. Co. v. *Grand Rapids S. & D. Co.*, 146 U. S., 54.

National Bank of Baltimore v. *Peters*, 144, U. S., 571.

Murray v. *Hoboken, etc., Co.*, 18 How., 272.

Rees v. *City of Watertown*, 19 Wall., 122.

Osborn v. *Nicholson*, 13 Wall., 662.

Wilkinson v. *Leland*, 2 Peters, 658.

Vale 26 A.

Williams v. *Moore*, No. 421. Decided April 6, 1868. 154 U. S. appendix.

If the position of appellee in this motion is sound, then the jurisdiction of the Supreme court of the United States is in such cases dependent upon the question of *forum* merely. Had the case remained in the state court, it could be heard and determined by this court as the tri-

bunal of last resort (upon appeal from the Supreme court of State), but because of its removal to the United States Circuit court, the appellate jurisdiction of the Supreme court of the country is denied, notwithstanding the litigation involves the construction or application of the constitution of the United States. The same result would follow even where the validity or construction of any treaty made by the United States was involved, or in any case where it was contended that the constitution or laws of the state were in contravention of the constitution and laws of the United States.

Appellate Courts Act of March 3, 1891, §§ 5, 6, 14.

Ekin v. *U. S.*, 142 U. S., p. 651.

Harner v. *U. S.*, 143 U. S., 575.

Borgmeyer v. Allen 157 U. S. 34.
Borgmeyer vs. Allen 157 U. S. 408

II.

THE DECREE OF FORECLOSURE IN GREEN V. GAGE, RENDERED BY THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, AT THE APRIL TERM, 1876, DID NOT AFFECT THE RIGHTS OF WILLIAM F. TUCKER, SR., AS GRANTEE OF THE EQUITY OF REDEMPTION, NOR THE RIGHTS OF HIS HEIRS, NOR THE RIGHTS OF THE APPELLANT AS GRANTEE OF THE LATTER. AS A GENERAL PROPOSITION, THEREFORE, THE APPELLANT MAY NOW LAWFULLY RECLAIM THE EQUITY OF REDEMPTION.

The general rule accepted by this court is that a party interested in the premises who was not served with process is not bound by a decree of a foreclosure of a mortgage, and is not bound to assert his title and possession, until ane jectment suit is commenced.

The case of *Noyes* v. *Hall*, (97 U. S., page 34,) is a case somewhat on all fours with the case at bar. In that case A, the owner in fee of certain lands, having mortgaged them to B to secure a debt, contracted in writing to sell and convey them to C, who thereupon, pursuant to the contract, entered on them, and thereafter remained in the open and visible possession of them. The assignee of B subsequently brought suit to foreclose the mortgage, but failed to make C a party. A decree of default was rendered, under which the lands were sold to D, who conveyed them to B after C had paid to A all that was due upon the contract, and received from him a deed, which was in due time recorded. B brought ejectment, and C filed his bill to redeem. *Held*, that C not having been served with process, was not bound by the foreclosure proceeding, and that the title which passed by the sale under them was subject to his right of redemption.

Hall, the owner of certain lands, mortgaged them to one Noyes, and afterwards conveyed them to a brother, Wright C. Hall, subject to the mortgage, who took possession of the lands, and held open, visible possession of them. Woodward was an assignee of Noyes, and the mortgagee brought suit in the Circuit court of the United States for the Northern district of Illinois to foreclose the mortgage, but failed to make Wright C. Hall a party, just as in the case at bar Tucker was not made a party.

A decree by default was entered, under which the lands were sold in October, 1861, by a master of the court, and purchased for $400 by one Pickering.

In the case at bar Mrs. Green was the purchaser herself. Pickering then conveyed to the original mortgagee, who brought ejectment against Wright C. Hall. Wright C. Hall filed a bill in equity, asking that he be

allowed to redeem the lands. The decree granted his prayer, and from that decree, Noyes, the mortgagee, appealed to this court. Mr. Justice Clifford delivered the opinion of the court. Four grounds were assigned as error. The second was that of laches; the fourth was, that the contract to convey the land to the complainant was subsequent to the execution of the mortgage. "When "the foreclosure suit was commenced the present com- "plainant was in possession of the premises; and the "record shows that he was not notified of the commence- "ment or pendency of the foreclosure proceedings. No "answer was filed in the case, of course, and the bill, like "the bill of Mrs. Green, the appellee, was taken as con- "fessed, and a decree of foreclosure was entered, under "which the premises were sold by the master for the sum "of $400."

The court further says: "Parties interested in the "premises were not served with process, are not bound by "that decree, and that it follows that the respondent took "his title subject to the right of the complainant ac- "quired under the deed just the same as if no such de- "cree had ever been made."

The court then go on to say, that the decree allowing him to redeem, was properly allowed upon him paying to the mortgagor within 100 days from the date of his decree, the mortgagee, the sum due, and that in default of such payment the bill of complaint shall stand dismissed, and that the respondent, if payment be made, shall within thirty days thereafter, execute to the complainant a good and sufficient deed, as prayed for in the bill of complaint. The decree was, therefore, affirmed.

This is the prayer that the appellant makes in this case, and this is the decree which the court below should have

rendered. The case above quoted was treated as if no foreclosure had ever been made, and the party was allowed to redeem within such time as the court thought equitable and just. In this case 100 days was thought sufficient to pay the sum of less than $1,000; and in the case at bar, the amount would be somewhere between $300,000 and $400,000, and a longer time should be granted to pay so large a sum. To the same effect are:

Howard v. *C., M. & St. P. Ry. Co.*, 101 U. S., 837.

Terrell v. *Pillison*, 31 Wal., 289.

It is claimed by appellant that he has been by the decree of the court in this case, deprived of his property rights without due process of law, in contravention of the fourteenth amendment to the constitution, and also of article 5 of the first twelve amendments to that instrument. It seems clear to us that this is a case involving the construction or application of the constitution of the United States. The appellant has filed his bill to redeem from the appellee the premises mortgaged by George W. Gage, the grantor to William F. Tucker, and through the heirs of Tucker the appellant derives a title. It is claimed by appellee that the foreclosure proceedings in *Green* v. *Gage*, deprived William F. Tucker, Sr., of his equity of redemption, thereby destroying the property rights of the heirs of Tucker, his heirs being the grantors of the appellant. The appellant contends that if the decree in *Green* v. *Gage* had such an effect it would be depriving William F. Tucker, Sr., and his heirs of property without due process of law, for the reason that William F. Tucker, Sr., was not made a party defendant in his individual capacity to the foreclosure proceedings in *Green* v. *Gage*. Appel-

lant contends that the pleadings and prayer for process in *Green* v. *Gage* clearly and incontestably show that the equity of redemption of William F. Tucker, Sr., was not put in issue or litigated in that case, and that the decree in that case could not affect Tucker's equity of redemption without violating his constitutional rights.

It may be claimed by appellee that William F. Tucker, Sr., was made a defendant in *Green* v. *Gage* only in his representative capacities as executor of the last will and testament of George W. Gage, and as one of the guardians, with others, of the minor children of George W. Gage, George W. Gage, Jr., and David A. Gage, but in this, as Tucker was not made a defendant in the prayer for process is unsound. The records show that a chancery subpœna was issued against Tucker, in his representative capacities, "as executor and guardian," and the return of the marshal states that he was served with the subpœna "as executor and guardian."

It was maintained, without reason, before the circuit judge, by the solicitors for appellee, that upon the whole bill, William F. Tucker was made a party defendant to the foreclosure proceedings in his individual capacity, as well as his official character. The averments in the bill of appellee in *Green* v. *Gage*, place it beyond dispute that William F. Tucker, Sr., was never made a party defendant in any capacity and was never sued nor served in his individual capacity as the owner of the premises or of the equity of redemption in the same. It is disclosed by the bill in that case that Mrs. Green, appellee, at the time, was fully cognizant of the fact that William F. Tucker, Sr., was the grantee of the mortgaged premises, and that he held the legal title to the premises. So ad-

vised at the time, it was the duty of the appellee to make William F. Tucker, Sr., a party to the foreclosure proceedings in his individual capacity, by apt allegations and prayer for process, thereby taking steps to foreclose whatever rights Tucker might have in the premises. *Hopkins et al.* v. *Roseclare Lead Company* (72 Ill., 373.) *Robins* v. *Arnold* (11 Appl. (Ills.) 439.) Knowing the rights of William F. Tucker, Sr., she could have directly attacked them at that time. She did not do this, but brought her suit against no person having any legal or equitable interest. Sarah H. Gage is named in her individual capacity, but she was wholly without interest, having before this conveyed all her interests to Tucker.

The assumption of the solicitors for appellee, that William F. Tucker, Sr., was before the Circuit court in his individual capacity, was correctly denied by the judge, who held that the allegations of the bill in the foreclosure proceedings, and the subpœna issued therein, made William F. Tucker, Sr., a defendant solely in his representative capacities; the court overlooking that he was never sued in the prayer for process in any capacity; but, he was of opinion, notwithstanding this, that the rights of William F. Tucker, Sr., were foreclosed in *Green* v. *Gage*. He based this conclusion upon the assertion that, although Tucker was before the court in representative capacities exclusively, yet that the bill contained sufficient averments to put him upon answer as to his individual interests in the subject-matter of the controversy.

The circuit judge, in support of his proposition, cites *Executor of Walton* v. *Herbert*, 3 Green's Chancery Re-

ports (N. J.) 73 and *Brasher* v. *Van Cortland*, 2 Johnson Chancery Reports, 242.*

* These cases, though not in point, are exceptions to the general rules of chancery practice. In a foot-note to Daniel's Chan. P. & P., under the title of Prayer for Process, "at page 390, 6 American edition, at note 3, it is said:"

"3 Story, Eq. Pl., § 44. A person whom the bill prays to be made a party; to make him such, process must be issued and served upon him. *Bond* v. *Hendricks*, 1 A. K. Marsh, 594; see *Huston* v. *McClarty*, 3 Litt., 274; *Verplanck* v. *Merc. Ins. Co.*, 2 Paige, 438; *Lyle* v. *Bradford*, 7 Monroe, 113; *Windsor* v. *Windsor*, 2 Dick., 707; *Fawkes* v. *Pratt*, 1 P. W., 593; *Hoyle* v. *Moore*, 4 Ired. Eq., 175; *Doherty* v. *Stevenson*, 1 Teen. Ch., 518. And if it is sought to sue a party as an individual and in a representative capacity, the bill should state the facts, and pray process against the defendant in both capacities; otherwise he will be held to be a party only in the character in which process was prayed against him. *Carter* v. *Ingraham*, 43 Ala., 78. A demurrer will lie to a bill containing no prayer for process. *Wright* v. *Wright*, 4 Halst. Ch., 143. But not a general demurrer. *Boon* v. *Pierpont*, 28 N. J. Eq., 7. By the former practice in New York, parties might be treated as defendants, by a clear statement in the bill to that effect, without praying the subpœna. The reason given was that in that state the subpœna was issued of course, and that a formal prayer was unnecessary to entitle the plaintiff to process. *Brasher* v. *Van Cortlandt*, 2 John. Ch., 245; *Elmendorf* v. *Delancy*, 1 Hopk., 555; *Ante*, p. 286, notes 4 and 5. Also in *Brasher* v. *Van Cortlandt*, denied the right of the commissioners in lunacy to object to the summons after appearance, on the grounds that their conduct throughout the progress of the case worked an estoppel. No decision was ever made against them in any capacity.

In the first case, the bill was filed against Herbert as the surviving executor of James Herbert, deceased, and the prayer was for process against James Herbert. The subpœna following the prayer for process issued against James Herbert, generally, without stating his official character, or, indeed, stating the character at all in which he was sued.

In the second case, the bill was against the committee of a lunatic. The subpœna omitted the addition to the plaintiffs as executors, and of the defendants as committee. Default was taken against the defendant as a committee and the decree entered against them in that capacity. In both cases, therefore, service was had upon the defendant, *generally*, without stating the character in which he was sued, and it was decided in accordance with the rules of practice in chancery then prevailing in the State of New York, but not elsewhere, *as an abstract proposition*, that when a defendant is sued generally he would be bound in any representative capacity that might appear from the averments in the bill of complaint—*the defendant appearing and being in court, and neither objecting to the subpœna or demurring to the bill.*

From these cases the circuit judge deduced, without warrant, and regardless of the correct principles of legal science, a principle that defendants served with process in their representative capacities were chargeable with notice of the entire contents of the bill, so far as it affected such defendants, either in their representative or their individual capacities, nor was the court mindful that in these cases these persons against whom the decree was made were defendants in some capacity, while in the case at bar, Tucker was not a defendant in any capacity. No case has gone so far as to hold that a party served with

process who is not a defendant in the suit in any capacity and who makes *no appearance*, is before the court for any purpose. The circuit judge did not cite any case in which the party who had been sued in his official capacity had been held by default in his individual capacity. Hereafter we will consider more at length the case of *Walton, Executor*, v. *Herbert*, and *Brasher* v. *Van Cortland*.

We may assume now, for the sake of argument, that where a subpœna is issued generally against the defendant named in the prayer for process, he is bound to take notice of all the averments of the bill of complaint, and that if, upon inspection, it is disclosed that he is charged officially, he is bound to plead, answer or demur to the averments in that capacity. We may assume, for the present, in a word, that when such a defendant is sued *generally*, the court has a rightful jurisdiction over him for all purposes disclosed by the allegations in the bill of complaint. But it does not follow from this, if true, that when he is sued and subpœnaed or summoned *officially*, that he is subject to the jurisdiction of the court for all purposes that may be extracted from a construction of the bill—*assuming, whether he is sued individually or in a particular capacity, that the defendant has appeared in person or by attorney.*

Our contention is, that when a defendant is sued officially he only represents the interests concerning which he is sued. A defendant may be content to allow a judgment, *pro confesso*, to be taken against him in his official capacity, when the bill of complaint does not put in issue his individual interests. An essential condition to the application of *res adjudicata*, as a doctrine, is identity in the quality or capacity of the persons for or against whom

the claim is made. (*Berry* v. *Hines*, 3 Ks., 394.) As a general rule, "the judgment of a court having jurisdiction of the subject-matter, and the parties, and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not complied with, when the same person, if a party in both suits, is sued in different capacities, and does not stand in the same relation or character in the case at bar as in the former suit." In a suit in which the party is sued in another capacity, he is, in contemplation of law, a distinct person and a stranger to the prior proceedings and judgment, and the party is estopped by the judgment in such case only in the capacity in which he appeared in the suit in which it was rendered. If a party is made a defendant in an official capacity, a judgment will not bind him personally, and if he is made a defendant personally, it will not bind him officially. But it is unnecessary to state to this court, above all others, the fundamentals of both our own jurisprudence and that of the civil law. We state it rather as a primary postulate than to enlighten the Supreme court of the United States.

Washington, Alexandria & Georgetown Sp. Co. v. *Sickles*, 24 How., 342.
Robinson Case, 37 Coke, 66.
Pothier on Obligations, 556.
Duchess of Kingston's Case, 3 Smith's Leading Cases, 2,088.
Sinclair v. *Jackson*, 8 Cowan 565.
Caruth v. *Gresley*, 57 Texas, 256.

There are a few cases to the effect that, if a defendant is summoned or subpœnaed generally, without special allegation of the character in which he is sued, he must, *if he appears*, object by exception or demurrer, or the decree will bind him to the extent, and to the extent only, that the decree is supported by the averments of the bill. But the authorities are unanimous in holding that, where a person is made a party in an official or representative capacity only, the person is before the court solely in that capacity, bound by the judgment exclusively as such—as a guardian, as executor or executrix, as administrator, as heir-at-law, as widow, as guardian *ad litem*, as trustee, as sheriff, as agent.

Jones v. *Blake*, 2 Hill. (S. C.), 629.
Leggett v. *Great Northern Railway*, 1 Q. B. Div., 599.
Legge v. *Edmonds*, 25 L. J. Chancery, (N. S.) 125.
Higginson v. *York Brewing Co.*, 2 Alk. (R. 44.)
McBurnie v. *Seaton*, 111 Ind., 56.
Lord v. *Wilcox*, 99 Ind., 491.
Van Colt v. *Prentice*, 104 N. Y., 57.
Frost v. *Koons*, 30 N. Y., 428.
Brooking v. *Dermond*, 27 Georgia, 58.
~~*Jackson* v. *Mills*, 13 Johnson's Chancery, 462.~~
Compton v. *Pruitt*, 88 Ind., 171.
Erwin v. *Garner*, 108 Ind., 488.
Grice v. *Randall*, 23 Vt., ~~245~~ 239.
Armstrong v. *Cavitt*, 78 Ind., 476.
Lord v. *Wilcox*, 99 Ind., 491.
McComb v. *Spangler*, 71 Cal., 418.

Davis v. *Davis*, 30 Georgia, 299.
Lander v. *Arno*, 65 Maine, 26.
Shaefer v. *Gates*, 2 B. Monroe, 457.
Landon v. [illegible], 112 N. Y., 73.
Jennings v. *Jones*, 2 Redfield, 95.
Havens v. *Sherman*, 42 Barb., 636.
Blakey v. *Newby*, 6 Munford, 64.
Bunch v. *Gard*, 107 Ind., 575.

In view of the prevailing *rationale* on this question, the cases cited by the circuit judge in support of his proposition are wholly devoid of application. In no sense are they *stare decisis* as to the case at bar. They are not in point. The decree against Tucker in *Green* v. *Gage*, was taken *pro confesso*, and it is important to remember that the power in equity to vacate such decrees never terminates, as a power, without a regular trial upon the merits:

Crowley v. *Leonard*, 28 N. J. Eq., 457.
Smith v. *Alton*, 23 N. J. Eq., 572.
Freeman on Judgments, Sec. 142.

In the *Executor of Walton* v. *James Herbert*, surviving executor of James Herbert, deceased, it was decided simply that if a defendant is properly charged in the bill as executor or devisee, or in any other special capacity, it is not if he appears, ground of demurrer that the subpœna was issued against him generally, without stating the character in which he is sued, that this must be taken advantage of by an objection to the subpœna itself.

In *Brasher* v. *Van Cortland*, cited by the judge at circuit, the decision against the committee of a lunatic, summoned generally, was not on the ground that he had been summoned generally (the court inferentially admitting that there might be merit in such a defense), and

therefore should take notice of the allegations in the bill, *but because he accepted a copy of the bill and actually entered his appearance*, and knew that the subpœna was not filled out in accordance with the prayer of the complaint, and made no objection in apt time. And we have seen that the practice in this case is singular, and now discontinued. It may be added that the interests of the committee were solely those of a committee. They had no other interest, the bill being by a creditor to sell the lunatic's estate for the payment of his debts.

It was objected in this case, by the committee, that ~~his~~ appearance in the suit had been in pursuance of a subpœna issued against ~~him~~ individually and not in ~~his~~ official capacity as a committee, and that, as all the subsequent proceedings by the plaintiff had been against ~~him~~ as a committee, no notice was taken of them, as if the proceedings were not in the suit to which ~~he~~ had appeared.

The court said: "I apprehend that the defendants are "too late with this objection, whatever consideration "might have been due to it, if it had been made on the "return of the subpœna and *the entering of the appear-* "*ance*.

"There was no bill filed by the plaintiffs but the one in "suit against the defendants as a committee, in which the "existence and history of the debt against the lunatic were "recited, and which he neglected or refused to pay after "admission of its being true, is there set forth. A copy of "this bill was taken by the solicitor for the defendant be- "fore his appearance. If the subpœna was not properly "filled up according to the prayer of the bill, and they were "not properly entitled, why was not the objection made in "time? They were informed of the contents of the bill.

" I should consider the process and appearance as suffi-
" ciently applicable to that bill, and the defendant should
" not now be permitted to deny it. It is not to be toler-
" ated in this court that a party, after taking a copy of a
" bill on which a subpœna had issued, and in which he
" was properly entitled and entered his appearance with-
" out the addition as committee, should lie by silently
" and suffer the complainant to go on unsuspectingly step
" by step down to a final decree on the ground of a valid
" appearance, and then start up with the objection that
" he had never appeared in that suit."

We ask wherein is either of these cases any authority supporting the propositi on announced by the circuit judge? On the other hand we now invite the attention of the court to certain cases that seem to us decisive of this branch of the case at bar, in favor of the appellant.

3 Ves. 599

Leggott adx. v. *Gr. Northern Ry. Co.* In this case the plaintiff was administratrix of her husband, who was killed on the defendant's railway. Suit was brought under Lord Campbell's Act. After that case was decided she brought an action in her own right not but as administratrix nor under Lord Campbell's Act. The court says: " The question arises, can " an admission on the record, made where the right of " the executor to bring the action is expressly so limited " (Lord Campbell's Act) be set up in another action " brought by the executor generally, irrespective of the " assets and estates of the deceased, so that in that " action the defendants, who have submitted in the " former action, are to be precluded from denying the " facts alleged in the second action?" The judge after putting this inquiry, goes on to answer it. He says, " I " think there is no estoppel under those circumstances. " * * * It is to be observed that the executrix in

"the case under the Act, does not sue in respect of any-
"thing which belonged to the deceased, but by force of
"the statute which enacts that the deceased's death is
"to be made the subject of an action just as if he had
"lived. Judge Quinn says, 'I am of the same opinion.
"I think the defendants are entitled to judgment upon
"the demurrer to the estoppel. The rule about the es-
"toppel is very correctly, I think, laid down in the
"Duchess of Kingston's case (2nd Sm. Ld. cases, 7th Ed.
"792). It is this: 'That it must be observed that a
"verdict against a man sued in one capacity will not es-
"top him when he sues in another distinct capacity,
"and, in fact, is a different person in law; in other words,
"it is generally put in the books, the plaintiff must not
"only be the same person, but he must be sued in the
"same right. I think in these two actions before us, al-
"though the administratrix is nominally the plaintiff, yet
"the administratrix is not suing in these two actions in
"the same right, but in very different rights altogether,
"and, therefore, that the estoppel does not arise.'"
Quoting also with approval *Bradshaw* v. *Lancashire & Yorkshire Ry. Co.*, Law Rep., 10 C. P., at page 192.

In the case of *Higgins* v. *York Bldg. Co.*, 2 Atkyns, page 43, the court says: "An administrator of a judg-
"ment creditor brought the original bill, and died; the
"executor of the administrator brought a Bill of Revivor,
"which was thought to be wrong, and thereupon an-
"other Bill of Revivor was brought by the same plain-
"tiff, having first taken administration *De Bonis Non*,
"etc., to the judgment creditor; the defendant pleaded
"the bill was for the same matter, and upon this it was
"referred to a master to examine whether it was so, who
"made a special report, that the last Bill of Revivor is

"brought by the plaintiff in a different right from what "the former was, but does not say it was, or was not, "for the same matter."

In *Stockton Building and Loan Association, appellant*, v. *George Chalmers et al., Louisa M. Chalmers, respondent*, 75 Calif., 332, the facts were as follows; During his lifetime one Robert Chalmers executed a mortgage upon certain premises in Eldorado county in the State of California. His wife, Lousia M. Chalmers, subsequently declared a homestead upon a portion of the same premises. Chalmers died thereafter, and an action to foreclose the mortgage was brought against George Chalmers, as the executor, and against the said Louisa M. Chalmers, the widow of Robert Chalmers, as executrix of the last will and testament of the said Robert Chalmers. In the foreclosure suit Louisa M. Chalmers the widow, as executrix, set up the fact of her declaration of a homestead on the mortgaged premises, and the court found its existence as a fact, and that it was subsequent in time and subject to the lien of the mortgage. A decree was entered in the foreclosure suit, and the property sold by the sheriff, who gave a deed to the plaintiff in the foreclosure suit as purchaser. The purchaser then demanded possession of Louisa M. Chalmers, pursuant to a clause in the decree requiring possession to be delivered to him, which was refused by Louisa M. Chalmers, whereupon the plaintiff applied for a writ of assistance. The Superior court of Eldorado county refused the writ upon the ground that Mrs. Chalmers was not individually a party to the foreclosure suit, and was not made such or concluded by the answer made in her representative capacity, setting up the homestead, or by the decree entered therein. Chief Justice SEARLES remarked: "It is well settled that a

" judgment for or against a party in one right cannot af-
" fect him when acting in another right. Louisa M.
" Chalmers was sued as the executrix of the last will of
" her deceased husband; as such she could only avail her-
" self of such defenses to the foreclosure suit as would
" have existed in favor of her testator, had he been living
" and a party to the case, and had he been living and
" a party defendant, he could not have concluded
" by the defense or want thereof his wife's right to
" the homestead. Such result could only be reached
" by action in the proceedings to which she was a party."
The case at bar is even stronger than that of the *Stockton Building and Loan Association* v. *Chalmers et al.*, for in the latter the widow made herself a party to the action for foreclosure by setting up the homestead right when sued as executrix.

In *Blakey* v. *Newby*, 6 Munford, 64, it was held that a plaintiff suing as administrator of his wife is not affected by a judgment against himself in her lifetime in an action to which she was not a party. The court said: " The
" decree against one as administrator, in a bill to compel
" the delivery of slaves claimed as a gift from the intes-
" tate, will not conclude his rights as a creditor in a bill
" by him against the former plaintiffs to set aside the gift
" conveyance they had."

In *Lord* v. *Wilcox*, 99 Ind., 491, the court says: " So
" far as the answer shows, the appellee was a party to
" the administrator's proceedings only as an heir and not
" as a creditor of his decedent."

" As a general rule, judgments conclude the parties
" only in the character which they sue or are sued."
Bigelow on Estoppel, 65.

"This general rule, we think, is applicable to the proceedings relied on as an estoppel in this case."

Elliott v. *Frakes*, 71 Ind., 412.
Armstrong v. *Covett*, 78 Ind., 476.
Compton v. *Pruitt*, 88 Ind., 171.

"Where after death of vendee suit is brought to enforce vendor's lien, the administrator of the deceased vendee is a proper party defendant, and where such vendee at the time of his death is possessed of other property subject to execution, his administrator is also a necessary party defendant. Where the vendor of real estate is an heir at law of the deceased vendee, and as such heir, and in no other character, is made a party to the petition of said decedent's administrator for an order to sell the real estate, the adjudication upon such petition will not estop the vendor, as a creditor of the decedent, from maintaining a suit for the enforcement of his vendor's lien on the real estate, for the general rule is, that judgments conclude the parties only in the character which they sue or are sued."

Craighead v. *Dalton et al.*, 105 Ind., 72, is in point on this question. Martha Craighead was the wife of John W. Craighead, by whom she had two children, Robert B. Craighead and Charles Craighead. John W. Craighead died intestate in November, 1869, seized of certain real estate. His widow, on the 17th day of September, 1872, married one David J. George, and remained his wife until her death in 1875. Charles Craighead died in October, 1878. January 14, 1875, Martha Craighead, then the wife of David J. George, executed with him a mortgage to David Illges on the land in controversy,

which had been set apart to her as the widow of John W. Craighead. January 17, 1876, Illges filed his complaint for foreclosure of the mortgage, making Robert B. and Charles Craighead parties thereto, both being served with process. Charles Craighead answered by a guardian *ad litem*, and Robert B. Craighead defaulted. A trial was had and a decree rendered foreclosing the interests of all the defendants in the suit, by virtue of which the land was sold. Robert B. Craighead then began a suit for the possession of the land, and Justice Elliott held that Robert B. Craighead was not made a party to the foreclosure suit simply as heir to his deceased mother but by the complaint he was challenged to assert his interests, and to show why the land should not be sold to pay the mortgage debt, and not having asserted his rights when he had the full opportunity to do so, he could not successfully assert any claim existing at the time the foreclosure suit was instituted. Justice ELLIOTT of the Indiana Supreme court, said in rendering the decision: "The "complainant in the foreclosure suit did not call the ap- "pellant into court in any *particular capacity*, nor did it "require him to answer as to any interest derived from "any particular source, but it called him into court to "answer *generally* and challenged him to assert such "rights as he had. * * * There is a limited class of "cases to which the rule upon the subject of a former "adjudication does not apply.

"That class is composed of cases in which a party is "sued in a *particular capacity*, and is held to be bound "only in the capacity in which he was sued. The case "under examination, however, is not a member of that "class, for the reason that the appellant was not sued "in a *particular capacity*, but was brought into court

" to answer as to the issues tendered by the complainant " *in his own right.* Where a party is brought into court " to answer as to his interests in his own right, he must " do so, or the penalty of his neglect will be a conclusive " judgment."

How pertinent are the facts in this case and the reasoning of Justice Elliott to the case at bar. William F. Tucker was served in his particular capacities, and should be held bound only in the capacities in which he was served sued. If he had been brought into the United States Circuit court by the appellee as to his own interest and in his own right, it would have been his bounden duty to answer to his own individual interests or incur the penalty of his neglect by the conclusiveness of the judgment. But the appellee in her foreclosure suit did not make him a defendant in any capacity and called him into court in a particular capacity, and thereby if required to answer at all, which we deny, required him only to answer in that particular capacity. She did not make him a defendant in the foreclosure suit generally, thereby challenging him to assert his rights as owner of the equity of redemption.

Judge PETERS said, in *Landon* v. *Arno*, 65 Maine, 26: " But the defendant has another difficulty to encounter. " The parties to the two litigations must be the same, or " must have an attitude in relation to each other having " the same effect as though they were identically the " same. Does that relation of parties exist here? The " other action was not with Landon, but with his grantees. To be sure, one of the grantees is the plaintiff in " this suit in his representative capacity as administrator. " But no importance can be attached to that fact any " more than there would be if the administrator were

"any other man. Nor does it appear that Landon con-
"veyed with any covenants of warranty, or that he ever
"defended that suit, or that he had an interest therein
"or knowledge thereof. Upon those facts the defense,
"by estoppel or *res adjudicata*, which the defendant
"seeks to establish, would fail. *The general rule that*
"*the judgment of the court having jurisdiction of the sub-*
"*ject-matter and the parties and the process, and rendered*
"*directly upon the point in question, is conclusive be-*
"*tween the parties, is not complied with when the same*
"*person, though a party in both suits, is such in different*
"*capacities, in the one individually, and in the other as ad-*
"*ministrator.*"

In *Green* v. *Gage*, had Tucker appeared and found that he had been properly sued as executor and guardian, a subpœna having been served on him as such, there would be no grounds, either for objection upon the return of the subpœna, nor for a demurrer to the bill. His not appearing, the bill being taken *pro confesso* against him, where he is served as executor and guardian though the bill did not make him summoned as such, would have no greater force than if he had appeared specially as executor and guardian and moved to dismiss the bill as fatally defective in not making him a defendant in some capacity in the prayer for process. His demurrer would not put his individual rights in issue, nor could a decree *pro confesso* so enlarge the issues as to embrace that which a demurrer would not have included. The appellee was at liberty to file a bill against the heirs of Gage and take whatever relief she might claim against them, and no one representing them as executor or guardian could object, if the averments in the bill made a good case against the heirs. Suppose, the case of *Walton, Executor*, v. *Herbert*, had

decreed against the defendant in his individual capacity upon averments in the bill against him in his official capacity, no one would contend, upon a decree being taken *pro confesso*, that he could have been bound in his individual capacity, the pleadings having made no such issue.

Bigelow on Estoppels, page 23.

Reynolds v. *Stockton*, 140 U. S., 257.

The title of this case is *Henry E. Reynolds and Henry E. Reynolds, as executor of the last will and testament* v. *John F. Smyth, as administrator, etc.* The opinion of the court in that case was delivered by Mr. Justice BREWER. He said that persons, by becoming suitors, do not place themselves, for all purposes, under the control of the court, as it can consider only the particular interests that have been put in question, and it is from these that the power of judicial decision arises. The court approves, in this opinion, of the case of *Unfried* v. *Heberer*, 63 Ind., 67. Mr. Justice CAMPBELL, in the case of *Packet Co.* v. *Sickles*, 24 Howard, 333–341, speaking for the court, says:

"The essential conditions under which the question of "*res adjudicata* becomes applicable, are the identity of "the thing determined, the identity of the cause, of the "judgment, *and of the parties in the character in which* "*they are litigants.*"*

* Wells Res Adjudicata, section 21, is found a case where a party sued as administrator under Ld. Campbell's act and after judgment in her own right as widow under the same act. The court said, it is generally put in the books that the plaintiff must be not only the same person, but he must be suing in the same right, and that a party named as having some sort of interest, but does not make him defendant in the prayer for process as to that interest or subpœna him as such, does not bind him as to that interest.

III.

The Supreme court of the United States has held, where it is claimed that the party has not been served with process according to law, and has, by the judgment of the court in such a suit, been deprived of any property or legal right, and upon investigation of the record it is found that such a question fairly arises, that the court would examine and determine the question as being one affecting the provisions of the constitution of the United States, as found either in the original document or in one of the fourteen amendments thereto.

The judgment of which the appellant complains in this case is one rendered in United States Circuit Court for the Northern District of Illinois, and therefore falls within the articles of the constitution of the United States hereinbefore alluded to, which are a limitation upon the courts to deprive of rights, personal or real, without due process of law.

If the court is satisfied that the decree of the Circuit court is erroneous, in refusing the prayer for relief, to the extent that appellant may have the right to redeem the premises, by paying to the appellee her debt, with interest and costs, with any advances she may have made, justly chargeable to the said premises by virtue of her mortgage, it must be upon the ground that the grantee of the mortgagor was not legally summoned as defendant in his own right, and that, without his appearance, he could not be deprived of his right of redemption, and that such right cannot be divested without due process of law. (*Myers* v. *Hill*, 97 U. S., 34-39.) If such is found, then the motion of the appellee must be denied.

The court having jurisdiction to hear the cause, as one falling within its appellate powers, may look into the record to see if there are any grounds for estoppel, which will preclude the appellant from having the aid of the court, in accordance with the prayer of the bill, or, in other words, whether the ancestor of his grantees had been guilty of such laches as to cut off his equity of redemption.

It is to be observed that this is not a proceeding to attack a foreclosure decree, declared void for want of proper parties and service of process upon William F. Tucker, Sr., without his being a defendant in any capacity. The contention is that the decree of foreclosure may possibly be valid enough as against the party who was defendant, Sarah S. Gage; a party without interest, but that Tucker, as to his equity of redemption, was not a party defendant in the foreclosure suit, and that no suit was ever commenced against him personally and no process whatever was served upon him as a defendant in that character. What appellant claims is that no decree has been taken against William F. Tucker, Sr., in his individual capacity, as the owner of the equity of redemption. The appellant denies that the pleadings in *Green* v. *Gage* involved any such decree, or if they did, that William F. Tucker, Sr., was ever served with a subpœna to answer in his individual capacity. Appellant seeks the right to redeem the equity of redemption that belonged to William F. Tucker, Sr., which has been purchased by appellant from the heirs of the said Tucker. The answer is made, substantially, by the appellee, that the decree in *Green* v. *Gage* is a decree against William F. Tucker, *personally, although he is not named as a defendant in any capacity in the prayer for process and he*

was not a defendant and he was not served in his individual capacity, and although the court below found in arguendo that he had not been served in his individual capacity.

This is an evasion of the constitutional right, William F. Tucker had to be brought into court by due process of law. If the point made by appellee is not well taken, that Tucker is bound personally in a suit to which he was not a party in his own proper person, Tucker's equity of redemption has not been barred, and he cannot be barred short of the time fixed by the statute of limitations. The appellant's bill avers that he is in possesssion of part of the property in question. As to this part he is not called upon to redeem; if, on the other hand, the mortgagee, under the statutes of the State of Illinois, in force at the date of the mortgages, do not foreclose within sixteen years after the maturity of her debt she is barred, and the mortgage is practically satisfied by the force of the statute. The statute does not run against the mortgagor, but against the mortgagee. If the mortgagee is in possession under her mortgage by said foreclosure, she is but a mortgagee in possession and the mortgagor under the statute has twenty years in which to redeem.

IV.

FROM THE WHOLE RECORD IN GREEN VS. GAGE, IT IS CLEAR THAT WILLIAM F. TUCKER, SR., WAS NOT IN IN ANY CAPACITY AND IT IS EQUALLY CLEAR THAT HE WAS NOT MADE A DEFENDANT, ALTHOUGH SERVICE WAS HAD UPON HIM SOLELY AS EXECUTOR AND GUARDIAN. THE RECITAL IN THE RECORD ENTRY OF DEFAULT, "THAT DUE "AND LEGAL PERSONAL SERVICE" HAD BEEN HAD UPON ALL THE DEFENDANTS DEFAULTING, MUST BE CONTROLLED BY THE RECORD THAT WILLIAM F. TUCKER, SR., WAS NOT A PARTY DEFENDANT IN HIS OFFICIAL CAPACITIES, AS EXECUTOR AND GUARDIAN, AND CERTAINLY NOT SUCH INDIVIDUALLY, IN HIS OWN INTEREST.

THAT WHICH APPEARS OF RECORD AFFIRMATIVELY, IS NOT TO BE NEGATIVED BY PRESUMPTIONS. RECITALS SHOULD BE CONSTRUED, IF IT IS POSSIBLE, IN A WAY TO HARMONIZE THE FACTS OF RECORD, AND NOT IN A MANNER TO PLACE THEM IN CONTRADICTION.

It was the contention of counsel for the appellee, before the Circuit judge, that as there was ample time between the issue and return of the subpœna served on Tucker in his representative capacity, and the time the default was taken at the April term of 1876, for the issue of *alias* or *pluries* subpœnas and service on Tucker individually, the court should presume that such service was obtained. *a.*

This was also a matter of defense, and appellee could have claimed that such process issued. By this demurrer she makes no such claim.

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a. No such presumption can be indulged in a case where the bill does not make a party a defendant. If the presumption is tolerable at all, it could only be indulged in a case where the defendant is defectively served in the first instance, but a presumption will never arise that a subpoena or an alias issued at any time against a party who is not a defendant.

The Circuit judge, however, held with this contention, and again he cited authorities handed him by the solicitors for appellee, apparently without giving them his personal examination. The cases are *Robinson* v. *Fair*, 128 U. S., 87, and *Sergeant* v. *State Bank of Indiana*, 12 Howard, 371, and an Illinois case, *Mulvey* v. *Gibbons*, 87 Illinois, 367. The cases from the United States reports are wholly without application to the facts in *Green* v. *Gage*, at least with the force ascribed to them by the solicitors for appellee and the circuit judge. *Sergeant and others* v. *The State Bank of Indiana* is inapplicable to the present case, when regard is had to subsequent decisions on the question, by the Supreme court of the United States. How, wide of the mark is *Robinson* v. *Fair*, may be judged, when it is noted *that the attorney for the minors appeared at every stage of the case.* *

As this is a question of practice, it is not necessary to plunge headlong into a sea of conflicting cases, decided by the courts of the states. It was said in *Alcott* v. *Supervisors*, 16 wall., 687: "It must be kept in mind "that it is only decisions upon a local question, those "which are peculiar to the several states, or adjudica- "tions upon the meaning of the constitution or statutes "of the states, which the Federal courts adopt as rules "for their own judgments." And the language of Mr. Justice FIELD in *Galpin* v. *Page*, in the Circuit court (3 Sawy, reported on appeal in 18 Wall., 350, 107): "The "ruling of the State court in *Hand* v. *Kelly*, except so "far as it gives a construction to the state statutes, and "on questions of a legal character peculiar only to the "state is not binding on this court. If the rule of the "court be correct, it applies not merely to judgments of "Superior courts of general jurisdiction existing in Cali-

* Filing bill and giving notice not sufficient service must be had
Wheeler vs Walker 65 Fed Rep 720

"fornia, but to judgments of such courts existing in all "other states." And the practice of Federal courts in chancery is not regulated by the practice in State courts (Foster's Fed. Practice, Sec. 6). The question at bar is of a general character and may be decided by the practice prevailing by virtue of the rules of chancery practice and the decisions of the Supreme court of the United States. In our view, the doctrine of the Supreme court of the United States fully supports the proposition that we have placed at the head of this branch of our argument.

An Illinois case was cited by the Circuit judge in support of his position. How far it is applicable we need not stop to consider, as it would not be decisive of the issue in dispute. What has been held by the Supreme court of Illinois on this question may be generalized somewhat as follows: "Recitals that the defendant was "duly notified of a suit by service of process upon him "in apt time is at least *prima facie* evidence of such "fact, and must be taken as well founded, *unless con-* "*tradicted by the record itself.*"

Matthews v. *Hopp*, 113 Ill., 690.
Chicago Dock & Coal Co. v. *Kingsley*, 93 Ill., 415.
Mulvey v. *Gibbons*, 87 Ill., 367.
Turner v. *Jenkins*, 79 Ill., 228.
Cullum v. *Phillips*, 130 Ill., 224.

In all these cases the defendant was sued in his individual capacity, and summons issued in his individual capacity, which was defective, and it appeared that there had been time to issue an *alias* summons between the defective service upon the defendant and the judgment. No case can be found in the state, where a party sued in

his official capacity, or not sued at all, though served with process, with the recital that he was before the court duly served, wherein the presumption was urged that he had been afterwards sued and made defendant in another capacity, and that an *alias* summons issued in another capacity from that in which he was originally sued, and that he was, as such defendant, before the court in his individual capacity.

Had the subpœna to Tucker, in his representative capacity, properly issued and afterward found defective, or the service defective, so that it had been necessary to issue an *alias* subpœna or a *pluries* subpœna, even then no presumption would exist that the subpœna had been *changed* from one in his official capacity to another in his individual capacity, unless the defect in the subpœna had been in this particular.

All that can be said of a case where suit was brought against one in his official capacity, and there is no averment in the bill that could sustain the decree, if sued in his individual capacity and service made, the appellee having full knowledge that such one had an interest, in his own right, and could be made a party defendant to the bill, is that the court should presume the party suing such a one in his official capacity was content to treat him throughout as such, unless the record shows an amendment making him a defendant in his individual capacity. Afterwards suing him in his individual capacity would be in the nature of a new suit, and unless it affirmatively appear in the record that such new suit was commenced and subpœna issued and served, the court will not presume, but will refer to the recital that the defendant was before the court, to the subpœna that was served upon him in his representative capacity, and as

such was before the court. "Wherever the expression "is general, in the recital, that the parties appear, etc., "it will be intended that no one came but he who had "been made a party defendant and summoned, and that "he came in the capacity in which he was summoned. "And this will particularly apply only where each of the "defendants are named in the prayer for process."

Puckett v. *Pope*, 3 Ala., 556.
Chester v. *Miller*, 13 Cal., 561.
Also see 80 Ala., 421; 50 N. J. Law, 546
14 Smedes & M., 76; 8 Smedes & M.; 421.

But what is the doctrine in the United States Supreme court in this regard? This tribunal has said, in *Galpin* v. *Page*, 18 Wall., 336: "The presumption which "the law implies in support of the judgments of Superior "courts of general jurisdiction only arises with respect to "jurisdictional facts concerning which the record is silent. "Presumptions are only indulged to supply the absence "of evidence or averments respecting the facts presumed. "They have no place for consideration when the evi- "dence is disclosed or the averment is made. When, "therefore, the record states the evidence or makes an "averment with reference to the jurisdictional facts, it "will be understood to speak the truth on that point, "and it will not be presumed that there is other or dif- "ferent evidence respecting the fact, or that the fact is "otherwise than is averred.

"If, for example, it appears from the return of the "officer or the proof of the service contained in the "record, that the summons was served at a particular "place, and there is no averment of any other service, it "will not be presumed that service was also made at an-

"other and different place; or if it appear in a legal "manner that the service was made upon a person other "than the defendant, it will not be presumed, in the "silence of the record, that it was made upon the de- "fendant also. Were not this so, it would never be pos- "sible to attack collaterally a judgment of a Superior "court, although a want of jurisdiction might be appar- "ent upon its face. The answer to the attack would al- "ways be that notwithstanding the evidence or aver- "ments the necessary facts to support the judgment are "presumed."

This court also said in *Settlemier* v. *Sullivan*, 97 U. S., 434, that "recitals do not bind as to service, *when the* "*service shown by the record shows how the service was* "*made.*" This court also says in *Robinson* v. *Fair*, 128 U. S., 87, "presumptions in favor of recitals may be "made, *unless contradicted by the record.*"*

Does not *Green* v. *Gage* fall within the principles thus set forth? A case of a defective service upon a person in his individual capacity is to be strongly distinguished from a case where the record shows the service complete upon the defendant in a particular capacity though not responsive to the prayer for process in the bill of complaint in suit, and entirely consistent with the recitals in the decree. The decree, as set forth in our statement of the case need not be set forth again. The parties were in the introductory part of the bill, named, though not made defendants in a certain order, naming William F. Tucker in his representative capacities, but not individually. None but Mrs. Gage, who was without interest,

*In Illinois the sheriff's return controls the recital. *Humner et al.* v. *Wolfer et al.* (124 Ill., p. 436.) *Dickson* v. *Dickson*, (124 Ill., p. 484). *Id. Id.* 484. *Mathews* v. *Hoff*, 113 Ill., 96.

were made defendants, because the prayer for process did not name them as such as required by the 23d Rule of the Supreme court of the United States in equity, and also according to the course of chancery practice. The marshal's return shows regular service in accordance with the language of the subpoena ~~bill~~. From the decree we deduce three things:

First. That it recites that the evidence on which it is based appears in the record—it appearing where it must necessarily appear, in the bill, in the process and in the return of the marshal.

Second. The decree does not names as defendants before the court, in the order and manner in which they are named in the introductory part of the bill, manifestly intending if the court had jurisdiction over them to default those parties and those only, including Tucker in his representative capacities.

Third. That as to the defendants in default, the matters and things contained in the bill of complaint be taken as for confessed.

What matters and things? Certainly not the question of Tucker's title, which is not rightly involved in any case to foreclose a mortgage, but the mortgage debt, its amount, default in payment of installment and interest on the part of the mortgagor and the interests of Tucker *officially* in the premises, all of which things Tucker might readily admit, and yet not have his rights as the owner of the equity of redemption taken away by the decree. Nowhere does the decree, judged by the record, profess to pass upon the individual rights of Tucker or upon the rights of Tucker in his individual capacity. It would indeed be a strained judicial conscience that could feel obliged to find in the recital of a decree service on a

person who was a stranger to the record in his individual capacity, or as in this case in any capacity, against the evidence of the record.

In no place in the bill of complaint, in *Green* v. *Gage*, was William F. Tucker, Sr., made a party to the suit in his individual capacity, as to his personal interest in the equity of redemption. It was no doubt the intention of the pleader to make him defendant in the bill of complaint as executor and guardian. The subpœna issued by the clerk is responsive to this intention in that it named Tucker defendant, as "executor and guardian." The return of the marshal as to service upon Tucker is of service upon him as "executor and guardian." *Ergo*, the recital in the default order of "due and legal "personal service upon the defendants" must be taken to mean the defendants, as they are made defendants in the bill and by the process. There is no absence of evidence in the record as to service upon Tucker, as "exutor and guardian," so that presumptions of any kind are unnecessary. The facts of the record disclose that he was summoned as "executor and guardian," and it cannot be presumed that there was other or different evidence contradicting that fact. It appears upon the return of the marshal and the proof of service contained in the record, that Tucker was subpœnaed in a particular capacity, and there was no averment that he was served in any other capacity. The record is not silent as to the manner in which William F. Tucker was attempted to be made a party defendant. It says he was made a defendant by subpœna and service in his representative capacity. This is not enough. The writ does not make defendants; it is in the prayer for process in the bill by which they are made.

This portion of our argument may be illustrated by cases from the State courts. Such cases may throw light upon our contention, although not necessarily authorities for the United States Supreme Court. In *Schaffer* v. *Gates*, 2d B. Monroe, 457, the court remarked: "Did "the lapse of twenty-three years prior to this suit infuse "vitality and vigor into that which was born dead? Has a "judgment once void been made valid by time? Justice "and the rights of society have authorized the adoption "of certain assumptions, and one is that a long lapse of "time cures irregularities in judicial proceedings and as- "sumes that everything that was done was 'soundly and "rightly done.'

"But time can never authorize the presumption that an "existing record, apparently complete and perfect, is not "substantially what it always was. The existence of ex- "traneous facts may be presumed, which the record does "not show, which were indispensable to the validity of the "judgment and which the record did not disclose. But we "cannot presume that Denny, as guardian *ad litem*, ap- "peared, while the record shows expressly that he did "not, and the judgment was by default."

So in *Green* v. *Gage*. The existing record is apparently complete and perfect, and the presumption is not authorized that it is not substantially what it is and has been, as shown by the bill of complaint, the process, and the return of the marshal. It is not necessary, in *Green* v. *Gage*, to presume any fact in order to sustain the validity of the judgment rendered in that case. The record shows that Tucker was not made defendant in his representative capacities but served with process in his particular and limited character. There is no presumption of ex-

traneous facts necessary to support the judgment in *Green* v. *Gage*.

Chief Justice BLECKLEY said, in *Hobby* v. *Bunch*, 83 Georgia, 9: "That the recital of services made in a "judgment foreclosing a mortgage upon realty, which is "silent as to the mode of service, is to be read in con- "nection with the sheriff's return, and where the return "sets out that the service was by leaving a copy at the "defendant's residence that mode and no other is the "one shown by the record or judgment roll, the whole of "which must be taken together."

So in *Green* v. *Gage*, the recital of service made in the default order is silent as to the mode of services made on William F. Tucker Sr., so that the recital must be read in connection with the marshal's return, which sets out that William F. Tucker, Sr., was served in the case as executor and guardian, in response to the averments in the bill of complaint in *Green* v. *Gage*, upon which process was issued.

In *Coan* v. *Clow*, 83 Ind., 417, it was observed by Judge WOODS: "That the recital in the record of a "judgment upon default in a court of general jurisdic- "tion, the process had been duly served, *nothing to the "contrary appearing in the record*, is conclusive against "collateral attack, *but if the process referred to is set "out, the recital will not control against any not named "in the writ.*"

So, in *Green* v. *Gage*, the recital says that the defendants in the case were duly served with process, and this recital must be taken as referring to the process issued in response to the bill of complaint therein, which shows that it was issued against Tucker as guardian and executor, and that he was served in those capacities.

There is, in *this* court, however, a case squarely in point. We refer to *Settlemier* v. *Sullivan*, 97 U. S., 444, wherein the defendant claimed title under a sheriff's deed, pursuant to the sale of lands under execution set out in the judgment by default rendered in 1861 against A. in the state court. A certified transcript of the judgment record, consisting, as required by the statute, of a copy of the complaint, the notice, with proof of service, and a copy of the judgment, was put in evidence. The statute also required that in cases *in personam* service should be made by the sheriff delivering to the defendant personally, or, if he could not be found, to some white person of his family above the age of fourteen years, at his dwelling house or usual place of abode, a copy of the complaint and notice to answer. The suit against A was for the recovery of money, and the sheriff's return showed that service was made "by delivering to the wife of A, a "white woman, over fourteen years of age, at the usual "place of abode, a copy of the complaint and notice," but it contained no statement that A could not be found. At the ensuing term judgment was rendered against him, with the recital that the "defendant, although duly served "with process, came not, but made default."

Mr. Justice FIELD said: "Here it is contended that "the recital in the nature of a default of the defendant in "a case in the state court, that, although duly served "with process, he did not come, but made default, is "evidence that due service on him was made, notwith-"standing the return of the sheriff supplies this omission, "but the answer is that the recital must be read in con-"nection with that part of the record which gives the "official evidence prescribed by statute. *This evidence* "*must prevail over the recital, and the latter, in the*

" *absence of an averment to the contrary, the record be-*
" *ing complete, can only be considered as referring to the*
" *former.* We do not question the doctrine that a court
" with general jurisdiction, acting within the scope of
" its authority, is presumed to act rightly, and to have
" jurisdiction to render the judgment it pronounces until
" the contrary appears. *But this presumption can only*
" *arise with respect to jurisdictional facts concerning*
" *which the record is silent.* It cannot be indulged
" with evidence respecting the facts as stated, or aver-
" ments respecting them so made. If the record is silent
" with respect to any fact which must have been estab-
" lished before the court could have rightly acted, it will
" be presumed that such fact was properly brought to its
" knowledge."

In *Green* v. *Gage*, the presumption should be that the record is complete. The recital in the default order, in that case, must be read in connection with that part of the record which gives the evidence as to how William F. Tucker, Sr., was made a party defendant in the case. The evidence disclosed by the bill, the process, and the marshal's return must prevail over and control the averments in the defaulting order. There is no question of jurisdiction raised by appellant as to *Green* v. *Gage* so far as Mrs. Gage is concerned. The appellant, in the case at bar, to this extent concedes the jurisdiction of the court in *Green* v. *Gage*.

William F. Tucker was not a party in his representative capacities in *Green* v. *Gage*, made so by the bill of complaint therein, and was not served by the process issued in response to the bill of complaint. The decree in *Green* v. *Gage* need not be disturbed so far as jurisdictional questions are concerned, to the extent that they related

or relate to Sarah H. Gage, and if the whole record is a series of fatal blunders the consequences must fall on her who is the author of them. "Our withers are unwrung."

A most important point to be remembered in this connection is that the judgment in *Green* v. *Gage* was by default as to William F. Tucker, Sr. The ordinary presumptions, therefore, in favor of the findings of a court of superior jurisdiction, entirely disappear in this class of cases—cases where judgment is taken by default—judgments by default differing essentially from those in which there is an appearance and *contestatio litis*, in which the parties have elected the ground on which they choose to place the controversy. Not only would judgment, in such a case, *not be aided by presumption, but the record must show affirmatively the existence of every material fact to give the court jurisdiction, and that all the proceedings were in accordance with law.* In judgments by default whatever may effect their competency or regularity, every proceeding, from the writ and the endorsement thereon down to the judgment itself, inclusive, is part of the record and is open to examination.

Hudson v. *Breeding*, 7 Ark., 445.
Elligood v. *Cannon*, 4 Harrington, 176.
Schloss v. *White*, 16 Cal., 65.
Harris v. *Hardeman*, 14 Howard, 338.
Black on Judgments, Sec. 93.

It has been held in England and those states where domestic judgments cannot be impeached collaterally that public policy and the dignity of the courts require that the recitals of the decree, whether of jurisdictional or other facts, shall not be impeached; but, in considering the argument from public policy, it should not be forgotten that the doctrine is relative in law and that the argu-

ment has force both ways—that those whose rights are divested by judicial proceedings are entitled to the same consideration in settling rules of law by which such proceedings are to be judged as those whose rights are acquired through them.

Faulkner v. *Guild*, 10 Wis., 577.

The recitals in every decree regularly aver the jurisdiction of the court; if no appearance may have been entered or defense made, and though such recitals could not be impeached under any circumstances, the most flagrant outrages on the rights of citizens could be perpetrated with impunity.

Judge MARCY remarked, in *Starbuck* v. *Murray*, 5 Wendell, 148, "The proposition that the record imports "perfect verity assumes the very fact to be established— "the only question in issue—it is reasoning in a circle. "'The plaintiffs in effect say to the defendants, 'The "paper declared on is a record because it says you ap- "peared, and you appeared because the paper is a record. "The appearance makes the record uncontrollable verity, "and the record makes the appearance an unimpeachable "fact.' Unless the court has jurisdiction it can never "make a record which imports uncontrollable verity to "the party over whom it has usurped jurisdiction."

We are earnestly of opinion, as the record does not affirmatively show that William F. Tucker, Sr., was ever made a party defendant and served in his individual capacity, but does show, affirmatively, that he was not served in that capacity, nor that he in any way submitted himself to the jurisdiction of the United States Circuit court in any capacity, that the decree foreclosing the mortgage on the premises, which is the subject-matter of

the bill to redeem, cannot lawfully be set up as an estoppel against his right to redeem, or the right of his heirs or of their grantees, the appellant. In fact, this is the pivotal question in the case, and if the records in the United States court affirmatively show that Tucker was not sued and served with process in his individual capacity, then the Supreme court of the United States must necessarily pass upon the question whether Tucker had been deprived of his rights to redeem without due process of law, by the decree in *Green* v. *Gage*. The general rule in this court and in the state of Illinois is, that a foreclosure, where the person interested in the equity of redemption is not made a party, is valid as to all persons but him, his rights remaining unaffected for the length of time given by the state Statute of Limitations. *Noyes* v. *Hall*, 97 U. S., 34, 39. To this rule, in Illinois, there is an exception in cases where the mortgagee knew of the existence of the interest of the grantee of the mortgagor; for, in such cases, the Supreme court of Illinois holds, with the Supreme court of the United States, (*Terrell* v. *Allison*, 21 Wall., 292), that, as to the grantee of the mortgagor, being an indispensable party to a valid foreclosure, without an opportunity given him to be heard and an adjudication upon his rights, the decree is inoperative, and the title vested in him, before the foreclosure proceedings, remains in him despite the sale under the foreclosure decree.

Hopkins v. *The Lead Co.*, 72 Ill., 373.
Robbins v. *Arnold*, 11 A. 9p. Ills., 439.

VI.

THE DOCTRINE OF LACHES IS NOT APPLICABLE TO WILLIAM F. TUCKER, SR., IN THE CASE OF GREEN V. GAGE, UNDER THE CIRCUMSTANCES, AND IS WITHOUT FORCE. THE DEFENSE OF LACHES CANNOT BE INTERPOSED, WHERE THERE IS A STATUTE OF LIMITATION THAT APPLIES DIRECTLY OR BY ANALOGY, AND WHERE THE PROPERTY IN CONTROVERSY HAS REMAINED IN THE SAME SITUATION, THE RIGHTS OF NO INNOCENT PERSON HAVING INTERVENED.

The judge at circuit touched upon the question of laches, but did not urge it. On this point, the courts of the United States will be influenced by the doctrine obtaining in the state where the property is located, against which foreclosure proceedings were had. It is the doctrine in Illinois, that, if the mortgaged property has passed into other hands than the mortgagee, neglect, inaction or omission to intimate any adverse claim, in case of foreclosure, might make laches available; but that, if the mortgagee became the purchaser at the sale, and held the property at the time of the suit to redeem, laches is not applicable.

Mulvey v. *Gibbon*, 87 Ill., 375.
Gibbons v. *Hoog*, 95 Ill., 45, 69.

That Tucker as grantee had a good and indefeasible title unless cut off by these foreclosure proceedings, must be admitted.

The doctrine of laches is an equitable one, and will not be allowed to deprive the rightful owner of his land, unless the principles of equity require it to be done.

By what means will a party having a good and indefeasible title to real estate lose it *in invitum* and the title and possession slip unto a wrongdoer?

It is to be regretted that no book has ever been written on this subject.

There are, however, a few clear and exact principles deducible from the cloud of authorities on this subject; notably that of Mr. Justice Brown, in the case of *Gallicher* v. *Cadwell*, 145 U. S., 368. This case is cited in most of the cases reported in the Supreme court of the several states, and in the Federal reports.

As the facts and circumstances in each particular case must always control, it will be useful first to ascertain what these facts are, and then apply the law of this court to them. This will not, however, be done, without mingling the facts with the law found in some of the authorities which are directly applicable to them.

The appellee's mortgages give a right of entry in case of condition broken. This is one of the remedies of the mortgagee, and is in most instances most merciful to the mortgagor. By this the rents and profits may not only keep down the interest, but sometimes reduce the indebtedness. In this case there is no forfeiture, and in this, in courts of equity "the quality of mercy is not strained."

In these cases, courts of equity will always presume that when the mortgagee enters without a valid foreclosure, or a special agreement, that he enters in a lawful way, and that he is not taking advantage of his own wrong. *Green* v. *Turner*, 38 Iowa, 112, 118; *Crawford* v. *Taylor*, 42 Iowa, 260, 264.

If this is so between the mortgagor and mortgagee, the rule is still more lenient to the grantee of the mort-

gagor, unless there is some promise on the part of the grantee to pay the mortgage, thus making it a personal obligation. The general rule is laid down in *Noyes* v. *Hall*, 97 U. S., 34, 39, which has already been quoted in the antecedent parts of this brief. Laches will not *run*, but only limp to bar the owner where there is no moral obligation on the part of the owner to pay off the indebtedness. This is apparent in the cases quoted by the chancellor in the court below, in which he says: "I "do not choose to put my decision in this case on this ground, *i. e.*, laches; although he was authorized to do so in a proper case, quoting *Lansdale* v. *Smith*, (106 U. S., 193); *Speidel* v. *Henrice*, (120 U. S., 377); *Richards* v. *Mackall*, (124 U. S., 183). *

In these above quoted cases, every moral obligation pointed to the fact that the claimant should have paid his personal debt to the party in possession of the property which he desired to recover. As in *Richards* v. *Mackall*, *supra;* or in cases where the party only had a right to call for the legal title; as in the case of *Lansdale* v. *Smith*, *supra*, where there was a delay of forty-six years, or in *Speidel* v. *Henrice*, *supra*, there was a delay of fifty years, and in both cases there were no vested rights. These cases and many like unto them, as the case of *Harter* v. *Twohig*, (158 U. S., 448), wherein rogues who had obtained the consideration for which the property had been sold, but only complained of the irregularities in the sale of their property, and which property should have honestly gone to pay their debts, and which, with snail pace, they never offered to pay or make any satisfaction until profit might be made out of a grudging and hobbling show of honesty, the courts have enforced the estoppel. In such cases "long suffering"

* As Tucker was not a party in the bill or Summons, he could not have sued out a Writ of Error.
Van Fleet on Collateral Attack. §17
Freeman on Judgements. §337

has no place in equity. In the case at bar all these bad things are wanting. In all these cases the court was dealing with arrant knaves, every one of them.

On the other hand, George W. Gage and William F. Tucker were both public-spirited men and heaped the community in which they lived with enduring benefits. Such men have no reason while living to believe, that when gone, their children would, through any sin of theirs, ever beg for bread.

The former, together with Mr. Paul Cornell, a life long friend, was the father of Chicago's park system—the World's Fair grounds, Jackson Park—

> "though unfinished, yet so famous,
> "So excellent in Art, and still so rising
> "That Christendom will ever speak his virtue."

and bear witness. Both he and Mr. Tucker died honored, and Mrs. Green, the appellee, possesses all the heritage for which they worked so honorably as a provision for their children. It is not to such men that the court will willingly let die their rights by mere lapse of time, unaccompanied by some act of theirs of wrong or inequity injuriously affecting the appellee.

The appellant then contends that the proceedings set up to make or mar the appellant's right is made of *record*. The property has not changed in its condition, or have the relations of the parties been changed, and the mortgagee who was the purchaser at her own abortive foreclosure sale, or as mortgagee in possession, is still in possession of the property, and no rights of third parties have intervened. No improvements have been made on the premises, and no material advance in the value of the property appears. The court will take judicial knowledge of current events, and every intelli-

gent gentleman knows that real property at the dates at which these two mortgages were executed, was at a high but sound value. The times were prosperous in a remarkable degree until the unfortunate failure of Mr. Jay Cook. At the time of the foreclosure the commercial community of the United States were in the midst of a financial crisis and challenged the forbearance of every wealthy creditor, and Mrs. Green, the appellee, had, by foreclosing her mortgage, an opportunity, denied at this pinching time, to many to have sufficient capital to buy, with what she had been contented to loan on these premises at the rate of 10 per cent. per annum, but which in a few years before had been at least worth two-thirds more than the amount for which she was able to secure the property under her forced sale. The property sought to be redeemed is, with the exception of the late Mr. Gage's homestead, farm land, and upon entry the appellee rented it as such, and received all the rents and profits. If the property has increased in value it has been by no merit of hers; it is only because of the return of the same prosperity which gave it its value at the time she made the loan and received the pledge. The foreclosure being made of record, as we have said, it speaks the same language now as when the proceeding occurred. This is well stated in the leading case of *Hammond* v. *Hopkins* (143 U. S., 224). Quoting from Mr. Justice Greer's opinion in *Sturnes* v. *Page* (46 U. S., 7 How., 817), Mr. Chief Justice FULLER said: "Every case must, of "course, depend on its own peculiar circumstances, "and there would be little profit in referring to books on "this subject. In the case of *Michael* v. *Girod* (45 U. "S., 4 How., 504), lately decided in this court, transac- "tions were investigated after a lapse of more than

" twenty years, but the facts proving the fraud were *all* " *on record* and were not disputed." The Chief Justice concludes this able opinion in *Hammond* v. *Hopkins* with a classic simile which recalls the judicial imagery of my Lord Coke, that " the hour-glass must (not) supply the " ravages of the scythe." In this case the scythe has made no ravages, but the record in *Green* v. *Gage* stands as plainly to be read to-day as it did at the time these proceedings were had.

This is not a case of trusts disputed, resulting or constructive, which requires testimony to establish. Mr. Justice HARLAN, in *Bryan* v. *Kales* (134 U. S., 126), which was a bill to set aside a purchase by an administrator at his own public sale, said: " Granting or refusing " upon that ground (laches) must depend upon the special " circumstances of each case. A court of equity should " be slow in denying relief on the mere ground of laches " in bringing suit." Certainly mere delay is not sufficient of itself to deprive appellant of his equity to redeem the premises in a case where all the persons interested are in the same condition now as they were at the time of the foreclosure. Everything is clearly established, and by record and " on principles of eternal justice " mere lapse of time ought not to be allowed to repel relief. In the case of *Alyett* v. *King* (Leigh, 84-86), where the evidence was preserved and there was no change in the situation of the parties, a bill for accounting was obtained after twenty years. By the permission of George C. Fry, Esq., a distinguished member of this court, I beg leave to refer this court to his exhaustive and intelligent brief on this subject, in the case of Thornwire Hedge Co., which case is now before the court. In it the defense of laches is considered at page 144 of this thoroughly

Mann vs Gray - 142 U.S. 236

Sharp vs Yyles 2 B. Monroe Ky. 457.

excellent brief. After reading this brief it would be an unfair plagiarism and an indelicate display of learning on the part of the counsel in the case at bar to use it in any other way.

Teal v. *Schroeder*, 158 U. S., 172, is a case where a power was given to sell lands under a power of attorney. The power was duly executed and placed on record, and no objection was made by others who were heirs at law of the donor. The Statute of Limitations barred the action, both at law and equity, to recover the property. The property consisted of several hundred different parcels of land in the city of San Jose, county of Santa Clara, California, and was in the possession of the grantees without any disturbance of their asserted title and any question of its validity; and thirty-two years after the death of the donor, and fourteeen years after the death of the attorney, who held the letters of attorney coupled with a power, and the circumstances attending the acquisition of the title to the property involved, had passed from the recollection of the survivors or successors of the claimant, consisting of numerous individuals, partnerships, companies and corporations, numbering in all 337 defendants. The suit was brought to obtain a transfer to the complainants of the property held by the parties claiming under the power of attorney, with allegations of fraudulent conduct on the part of some of the parties, etc.

It is no wonder, under such circumstances, and some others not necessary to state, that the court should have held that the complainants were guilty of laches.

The case of *Abraham* v. *Ordway*, *id.*, 416, was a case cited as particularly proper for the application of the

principle of laches when to disregard it, injustice would be done.

In this case the time was nineteen years. The facts ran through a labyrinth of divorces. The party was privy to the trust deed and had knowledge of all the circumstances. It was held on these facts, that the plaintiff, and those under him that asserted title, had been guilty of such laches as to have lost the right to invoke the aid of a court of justice.

In the case of *Harter* v. *Twohig*, *id.*, 448, the court held in this case, bad faith, lapse of time and a variety of inculpating facts made it a gross inequity to grant the relief.

None of these facts are present in the case at bar.

These cases are furnished, as the exception proves the rule, and show what the courts mean when they apply the doctrine of laches to cases in equity.

It must be remembered that the appellee herself purchased the premises in controversy, at the foreclosure sale, commenced within sixty days after the death of Mr. Gage, and is now in possession of a very large part of the same, a small portion remaining still in the possession of appellant, so that the facts under consideration fall squarely within the principles obtaining in the State of Illinois.

Federal courts of equity usually follow, by analogy, state statutes of limitation, especially in foreclosure suits.

Weidner v. *Bayard*, 7 How., 234.
Broderick's Will, 21 Wall., 503.
Godden v. *Kimmell*, 99 U. S., 201.
Nores v. *Haggen*, 136 U. S., 386.

Cleveland Insurance Co. v. *Reed*, 1 Biss., 180.

Reeves v. *Vinacke*, 1 McCreary, 213, 217.

Although the Statutes of Limitations in this country do not extend to suits in chancery, yet the chancery reports have acknowledged their application. From this it is clear that Statutes of Limitation would be given effect, in equity, the same as in law, in case where mere lapse of time is offered as a defense.

Miller v. *McIntyre*, 6 Peters, 60, 66.
L. Mendorf v. *Taylor*, 10 Wheaton, 152.
Larore v. *Beem*, 10 Ohio, 493.

Neither the appellant or his grantors, the heirs of Tucker, or their grantee under the laws of the State of Illinois regulating the rights of mortgagor and mortgagee, could be affected with laches arising out of mere lapse of time on account of not redeeming the premises from the mortgagee. Indeed, the time given by law in which to redeem, repels the doctrine of laches during the continuance of that time. Laches is an equitable doctrine, and is fixed by the acts or non-acts of the parties, while a statute of redemption is a positive limitation.

It has been held in Illinois that the mortgagor's right of redemption is only barred in twenty years after the mortgagee enters for breach of condition, so twenty years' possession by mortgagee or mortgagor without admission of the other's right, bars such right, but not until twenty years have expired.

Halsey v. *Jackson*, 66 Ill., 139.
Locke v. *Caldwell*, 91 Ill., 417.

Mottle vs Cable 1st Johnson 386

The public policy of the State of Illinois on this subject has ever been in amelioration of the rigor of the law, and in favor of a debtor who has furnished his creditor a pledge as security for his debt.

First. The law gave, as we have seen, twenty years in which the mortgagee could enforce his mortgage after its maturity, and a like right was given the mortgagor to redeem in case the mortgagee was in possession.

Second. Afterwards the law abridges the right of the mortgagee to sixteen years, while the right of the mortgagor was still preserved for the period of twenty years.

Harris v. *Mills*, 28 Ill., 44.

And this was the law at the time the appellee filed her bill and which controlled her right.

McMillan v. McCormick, 117 Ill., 79.

And if it is claimed by appellee that reciprocity in equity should also cut down mortgagor's right from twenty years to sixteen years, the answer is, the appellant filed his bill for redemption within thirteen years, and which gave him verge and room enough to spare in which to do so.

Third. At the time the pretended foreclosure proceedings by appellee were had, the mortgagee had been still further cut down in her right to foreclose her mortgage, to ten years (Starr and Curtis' Sta. Ills., 1,550) from the date of its maturity.

Thus it is clear that public policy of the State of Illinois is made apparent by legislation, that it is not to bar the mortgagor of the redemption within twenty years, but that the mortgagee is disqualified from foreclosing unless it is done within sixteen years at the time that this mortgage was executed, and in ten years at the time the fore-

closure proceedings were commenced, after the right to do so had accrued.

VII.

Throughout this discussion fundamental principles have been assumed and the general learning of the law on this subject ascribed to the Supreme court of the United States; a foreclosure suit is a proceeding *in personam*, as well as *in rem*; that the equity of redemption is the essential estate in law and equity, the interest of the mortgagee being only one of security, and chattel in its character; that the equity of redemption is an estate that may be granted by the mortgagor, or descend to his heirs; that the grantee of a mortgagor, or of his heirs of the equity of redemption, if he or they are to be bound, is an essential party to proceedings in foreclosure.

ROBERT RAE,

Of Counsel for Appellant.

RICHARD S. THOMPSON,

F. B. DYCHE,

Solicitors for Appellant.

Office Supreme Court U. S.
FILED.
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CLERK.

No. 160.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

JOHN EVANS CORNELL, *Appellant,*

vs.

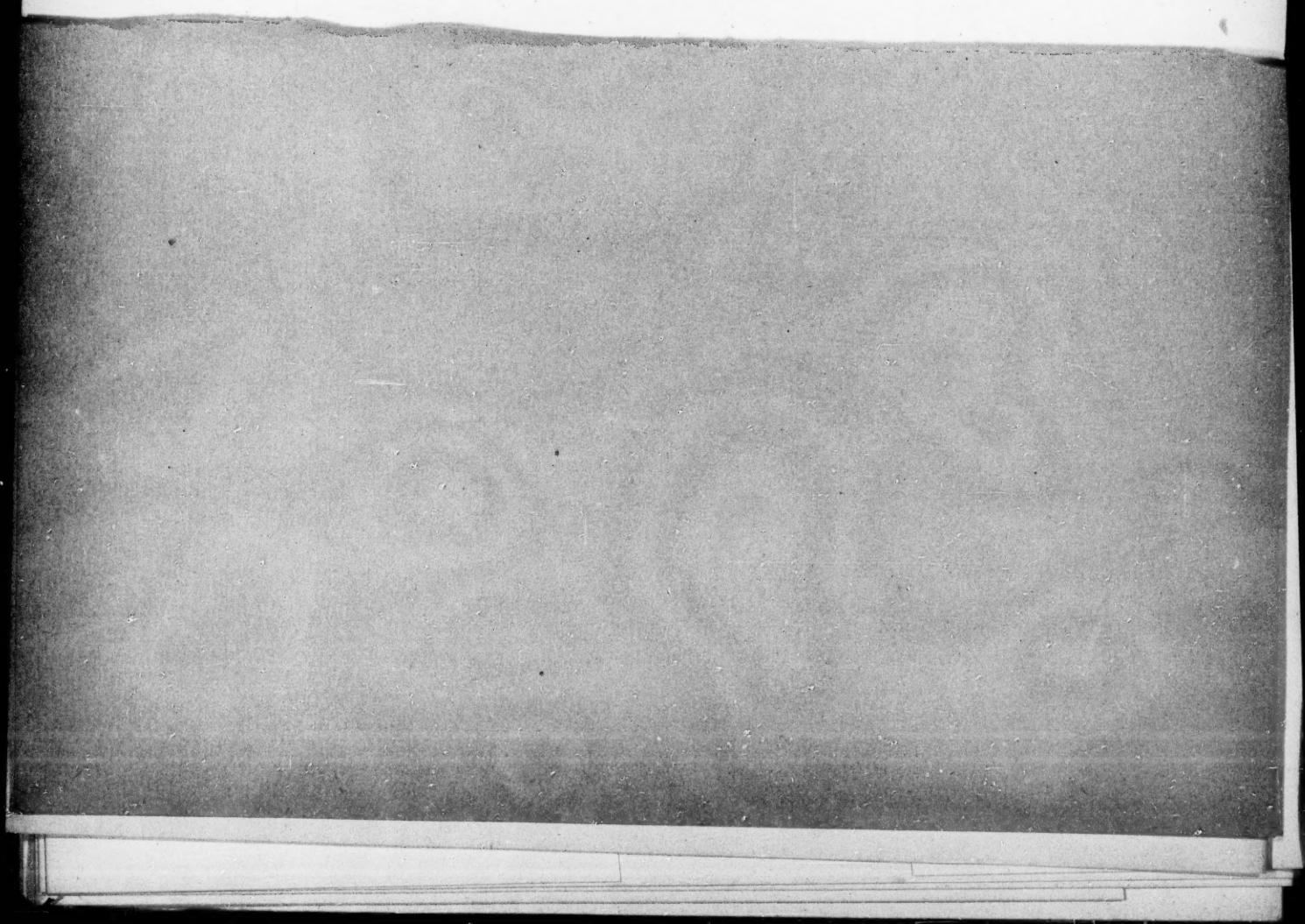
HETTY H. R. GREEN, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

CHARLES W. OGDEN,
Of Counsel for Appellee.

Maverick Litho-Printing Co., San Antonio.



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STATEMENT.

We ask leave to make a statement of this case in order that it may be conveniently referred to in considering the propositions which we will hereinafter submit.

This appeal was taken from the decree of the Circuit Court of the Northern District of Illinois, entered on the 14th day of July, 1890.

The bill in this case, being entitled Cornell vs. Green, was filed in the Circuit Court of Cook county, Illinois, on the 4th day of April, 1890. It was a bill wherein the plaintiff, John Evans Cornell, sought to redeem certain property, situated in the county of Cook, State of Illinois, which had been previously sold to Hetty H. R. Green under a foreclosure decree and sale had under the orders of the United States Circuit Court for the Northern District of Illinois in a case entitled Green vs. Gage.

The bill in the case of Cornell vs. Green refers to the records and files and exhibits in the case of Green vs. Gage, and prays that the same may be considered a part of the bill in the case at bar. The transcript, therefore, contains all the pleadings and exhibits to the pleadings, and the decrees and proceedings in both cases, and we will, therefore, make a statement of each case.

CORNELL VS. GREEN.

The bill in the case at bar was brought by the plaintiff, John Evans Cornell, against "Hetty H. R. Green "of the City and State of New York, Julius White, "trustee, Benjamin E. Gallup, trustee, Laura E. Young. "G. C. Peterson, Joseph Dow, and John Katzke, of "Cook county, State of Illinois." (Tr., 2.)

The bill alleges that on the 22nd day of June, 1871. George W. Gage was the owner in fee simple of the property in controversy and that on that day he, joined by his wife, executed and delivered to Julius White, trustee, a trust deed wherein the said Gage conveyed to

the said White, as trustee, a portion of the property in controversy to secure the payment to the Traveler's Insurance Company, of Connecticut, of a bond for $50,000.00 and interest at 9 per cent per annum. (Tr., 3.)

That on May the 7th, 1873, George W. Gage, David A. Gage, and John A. Rice executed their note to Hetty H. R. Green for the sum of $100,000, with interest at 10 per cent per annum, and also six (6) interest coupon notes for the sum of $5000 each, and to secure the payment of the said notes said George W. Gage and Sarah H. Gage, his wife, executed and delivered to Benjamin E. Gallup, trustee, a certain trust deed conveying all of the property in controversy, and reference is made to the files in the case of Green vs. Gage for more particular information as to the terms and conditions of the said trust deeds and notes. The files in the said case of Green vs. Gage are prayed to be taken as a part of the bill in the case at bar. (Tr., 3 and 4.)

That on December the 18th, 1874, George W. Gage and his wife, Sarah H. Gage, conveyed by warranty deed all the property in controversy to one William F. Tucker, and that the said George W. Gage thereafter, to-wit: on the 24th day of September, 1875, departed this life, and that William F. Tucker died on the 13th day of September, 1887, leaving certain heirs at law above the age of 21 years, and that the said heirs at law by certain instruments which are in the bill described as "good and sufficient" deeds, dated in the months of January, February and March, 1890, conveyed the property in controversy to the complainant, John Evans Cornell.

That on November the 27th, 1875, Hetty H. R. Green filed in the office of the Clerk of the Circuit Court of the United States for the Northern District of Illinois, a certain bill in equity, seeking the foreclosure of both the trust deeds hereinbefore referred to, alleging that she had purchased the bond given to the Traveler's Insurance Company, and alleging that default had been made in the payment of interest, etc., and that various proceedings were had in the said case of Green vs. Gage, which culminated in a foreclosure and sale and purchase by the appellee herein, Hetty H. R. Green, and by the execution of a Master's deed to her on February the 3rd, 1877, which was recorded in the Recorder's office of Cook County, Illinois, on February 5th, 1877.

It is further alleged that the said William F. Tucker was the owner in his own right of all the property in controversy at the time the said bill for foreclosure was filed and that his title was of record and that the said Tucker was not made a party defendant to the said forclosure proceedings, nor was he ever in Court subject to the orders, decrees and judgments of the said Court, and that the said decree of foreclosure was of no binding force or effect upon the said Tucker nor upon his heirs, nor upon the said Cornell as the grantee of the said heirs of the said Tucker.

It is alleged that the complainant is in possession of a certain portion of the premises and it is also alleged that the defendants, Laura E. Young, G. C. Peterson and John Kaztke are in possession of certain other portions of the premises, but as to each of these defendants it is

alleged that they have no "other or further interest in "said property than as tenants on said premises by "lease from the said Hetty H. R. Green, but that the "terms of the said lease are unknown to your orator." (Tr., 6 and 7.)

It is alleged that the defendant, Benjamin E. Gallup and the defendant Julius White, have no further interest in the premises than as trustees in the said trust deeds.

The bill concludes with a prayer for an accounting for the purpose of ascertaining the amount due the said Hetty H. R. Green, and that upon its payment the defendants may be decreed to surrender and deliver up possession of the said mortgaged premises, and that the defendants, Benjamin E. Gallup and Julius White, trustees, may be compelled to release said trust deeds and that the said foreclosure proceedings in the case of Green vs. Gage may be set aside as null and void as to the interests of the said Cornell. (Tr., 5, 6, 7 and 8.)

On the 21st day of April, 1890, the defendant Hetty H. R. Green appeared and filed her petition and bond for the removal of the cause to the Circuit Court for the Northern District of Illinois, in which she alleges that she is a citizen of Vermont and that complainant is a citizen of the State of Illinois and that "there is a contro-"versy which is wholly between citizens of different "States which can be fully determined as between "themselves, to-wit: a controversy between your peti-"tioner and the said complainant, John Evans Cornell." (Tr., 10 and 11.) Upon this petition the case was removed.

On May 3d, 1890, the solicitor for the complainant, John Evans Cornell, filed a motion to remand the cause to the said Court on three grounds: 1st, Because the bond and petition for removal were insufficient and informal; 2d, Because the cause was removed improperly and without lawful authority; and, 3d, Because the Court had no jurisdiction of said cause. (Tr., 13.)

The motion to remand was heard before Judge Blodgett on the 5th of May, 1890, and taken under advisement. (Tr., 14.) There seems to have been no order entered over-ruling the motion to remand, but it is inferentially over-ruled by reason of the fact that the Court proceeded to hear the demurrer in the cause.

The defendant Hetty H. R. Green, on May 26th, 1890, filed her general demurrer to the bill which was heard and sustained before Judge Blodgett, on the 30th day of June, 1890, and the bill was dismissed for want of equity.

The written opinion of the Court sustaining the demurrer is found in the transcript, pages 16 to 21, wherein the Court holds that it appears from the record in the cause of Green vs. Gage, that the said William F. Tucker was made a party to the foreclosure proceedings and was duly served with process and that the foreclosure and sale barred his equity of redemption, and also holds, in substance, that if it had been true that Tucker was not made a party to and served with process in his individual capacity in the case of Green vs. Gage, he would probably be held to have lost his rights to redeem by his delay; but the Court preferred to place its decision upon

the ground that Tucker was bound by the decree as that was conclusive of the rights of the parties.

On the 7th day of July, 1892, the complainant, John Evans Cornell, applied for an appeal and the appeal bond was approved by Judge Gresham on the 9th day of July, 1892, and the appellant on the same day filed an assignment of errors as follows:

"1st. That the Court erred in dismissing his bill of "complaint for want of equity.

"2nd. That the Court erred in refusing to grant the "prayer of the complainant as prayed in his bill of com- "plaint.

"3rd. That the Court erred in refusing to grant so "much of the prayer of said bill of complaint in which "it is asked that he be decreed the right to redeem his "said lands mentioned in said bill from the mortgage "debt due to Hetty H. R. Green.

"4th. That the Court erred in holding that William "F. Tucker, the grantor of the land mentioned in said "bill of complaint, was barred of his equity of redemption "by reason of the foreclosure proceedings had by Hetty "H. R. Green, filed in the United States Circuit Court "for the Northern District of Illinois, in the month of "November, 1875, in a case in which Sarah H. Gage, "William F. Tucker, executor and guardian, and others "were defendants, the said Tucker never having been "personally sued or served with process or in any way "submitted himself to the jurisdiction of said Court, and "that said finding deprived said complainant of his prop- "erty without due process of law." (Tr., 21, 22 and 23.)

GREEN VS. GAGE.

The pleadings and proceedings in this cause are attached to and made a part of the bill in the case at bar. The bill in the case of Green vs. Gage makes parties to the bill in the following language:

"Your oratrix, Hetty H. R. Green, who is a resident "of Bellows Falls, in the State of Vermont, and a citi- "zen of said last named State, brings this her bill of "complaint against Sarah H. Gage, a resident of the "City of Chicago, Illinois, and citizen of the State of "Illinois, and the widow of the late George W. Gage, "of Chicago, deceased, and executrix of his last will "and testament; Eva Gage, Mary B. Gage, Carrie E. "S. Gage, Alice Gage, George W. Gage, Jr., and Da- "vid A. Gage, children of the said George W. Gage, "deceased, each of said children being now residents of "the City of Chicago and citizens of the State of Illi- "nois, the last two named children, George W. Gage, "Jr., and David A. Gage, being minors; *William F.* "*Tucker, Joseph K. Barry, and John W. Clapp, all of* "*whom are residents of the county of Cook, State of Illi-* "*nois, and citizens of said last named State, and guard-* "*ians of said minor children, the said William F. Tucker* "*being also one of the executors of the last will and testa-* "*ment of the said George W. Gage, deceased;* Lewis L. "Coburn, a resident of Chicago, and citizen of the State "of Illinois, also one of the executors of the last will "and testament of the said George W. Gage, deceased;

" David A. Gage and John A. Rice, of the City of Chi-
" cago, each of whom is a citizen of the State of Illi-
" nois ; Benjamin E. Gallup, Francis B. Peabody, and
" George L. Paddock, residents of the City of Chicago,
" each of whom is a citizen of the State of Illinois; John
" N. Jewett and Charles T. Adams, residents of the City
" of Chicago and citizens of the State of Illinois ; the
" Thayer and Tobey Furniture Company, a corporation
" organized under the laws of the State of Illinois and
" doing business in said City of Chicago; Julius White
" and Jonathan Goodwin, Jr., residents of the county of
" Cook aforesaid and citizens of the State of Illinois;
" the Mechanics' National Bank of Chicago, a corpora-
" tion organized under the laws of the United States and
" doing business at Chicago aforesaid so long as they
" continued in business ; the Illinois Trust and Savings
" Bank, a corporation organized under the laws of the
" State of Illinois and doing business at the City of Chi-
" cago aforesaid ; Moore C. White, Charles H. Gaubert,
" and James E. Gross, residents of said Cook county
" aforesaid and citizens each of the State of Illinois; the
" Chicago File Company, a corporation organized under
" the laws of the State of Illinois and doing business
" in Cook county aforesaid; Charles M. Smith, the presi-
" dent of said Chicago File Company, a resident of Chi-
" cago aforesaid and a citizen of the State of Illinois;
" Monroe Heath, a resident of Chicago and citizen of
" the State of Illinois; William F. Milligan, a resident
" of Chicago and citizen of the State of Illinois; Charles
" Tobey, a resident of the State of Illinois and resident

" of Chicago aforesaid, *all of which persons and corpora-*
" *tions before named are made defendants herein;* also
" the following named persons and corporations: Don-
" ald Bremmer and Charles D. Welden, of Chicago, citi-
" zens of Illinois; Bradford Hancock, of Chicago afore-
" said, a citizen of the State of Illinois; William Coffin,
" resident of Batavia, in said State, a citizen of the
" State of Illinois; Alexander A. McDonnell, Charles
" A. Mather, Alexander S. Maltman and George F.
" Morcom, Clark Lipe, John B. Adams, Da-
" vid Kenly, George R. Jenkins, Charles F.
" Swift, all residents of Chicago aforesaid, and
" each a citizen of the State of Illinois; Crane
" Bros. Manufacturing Company, a corporation organ-
" ized under the laws of the State of Illinois and doing
" business at Chicago aforesaid; August Schiffer, resi-
" dent of Will county, Illinois, a citizen of said last
" mentioned State; the First National Bank of Sioux
" City, a corporation organized under the laws of the
" United States of America and doing business at Sioux
" City, State of Iowa, each of whom your oratrix asks
" may be made defendants to this bill." (Tr., 24 and 25.)

Then follow allegations in regard to the execution of the notes and trust deeds and the purchase by the complainant Hetty H. R. Green of the bonds given to the Traveler's Insurance Company and the default, and as directly pertinent to the issues presented in this cause the bill contains the following allegations:

" Your oratrix further shows that the said George W. " Gage, the maker of said notes, heretofore, to-wit: On " the 24th day of September, 1875, at Chicago aforesaid, " departed this life, leaving him surviving the said Sarah " H. Gage, his widow, and the said Eva Gage, Mary B. " Gage, Carrie E. S. Gage, Alice Gage, George W. " Gage, Jr., David A. Gage, his only children (the last " two named being minors), and leaving a last will and " testament, in and by which he appointed the said " William F. Tucker, Lewis L. Coburn, and his said " widow, executors and executrix, and devised to them, " upon certain conditions therein named, all his real " estate, having before that time, as appears by the " records in said Recorder's office, by deed executed by " himself and wife, dated December 18th, 1874, and " recorded in said Recorder's office December 19th, 1874, " for consideration, as expressed in said deed, of $24,000, " conveyed to said Tucker all said premises herein de- " scribed, subject to said incumbrances.

" Your oratrix further shows that said above named " parties against whom this bill of complaint is brought " have or claim to have some interest in said premises " described in said trust deed by mortgage judgment, " conveyance, or otherwise; but your oratrix states those " interests, whatever they are, are subject to the rights " of your oratrix under her securities before mentioned " and cannot be set up against the same nor in any way " interfere therewith." (Tr., 34).

The prayer for process is in the following words:

" May it please Your Honors to grant to your oratrix " a writ of summons, issued out of and under the seal of " this Honorable Court, according to the rules and prac- " tice of said Court, directed to the said Sarah H. Gage " and the other defendants hereinbefore named, com- " manding them," etc. (Tr., 35 and 36).

The foregoing bill was filed in the United States Circuit Court for the Northern District of Illinois, on November 27th, 1875, and on the same day a chancery subpœna was issued out of said Court and as the alleged defect in this process is the principal ground upon which the appellant relies for relief we here set it out in full :

" UNITED STATES OF AMERICA, } ss.
" NORTHERN DISTRICT OF ILLINOIS. }

" The United States of America to Sarah H. Gage, " widow of the late George W. Gage, deceased, and ex- " ecutor of his will; Eva Gage, Mary B. Gage, Carrie E. " S. Gage, Alice Gage, George W. Gage, Jr., and David " A. Gage, children of said George W. Gage, deceased, " William F. Tucker, Joseph K. Barry, and John W. " Clapp, **guardian*, etc., and William F. Tucker, **exec-* " *utor*, etc., Lewis L. Coburn, **executor*, etc., David A. " Gage and John A. Rice, Benjamin E. Gallup, Francis " B. Peabody, George L. Paddock, John N. Jewett, Charles " T. Adams, the Thayer & Tobey Furniture Company, " Julius White, Jonathan Goodwin, Jr., the Mechanics' " National Bank, of Chicago, the Illinois Trust & Sav-

*The Italics are ours.

" ings Bank, Moore C. White, Charles A. Gaubert,
" James E. Gross, the Chicago File Company, Charles
" M. Smith, president of said Chicago File Company,
" Monroe Heath, William F. Milligan, Donald Brem-
" mar, Charles W. Weldon, Bradford Hancock, William
" Coffin, Alexander A. McDonnell, Charles A. Mather,
" Alexander S. Maltman, George F. Morcom, Clark
" Lipe, John B. Adams, David Kenley, George R. Jen-
" kins, Charles F. Swift, Crane Bros. Manufacturing
" Company, August Shiffer, the First National Bank of
" Sioux City, greeting:

" We command you and every of you that you ap-
" pear before our Judges of our Circuit Court of the
" United States of America for the Northern District of
" Illinois, at Chicago, in Said District, on the first Mon-
" day in the month of January next, to answer the bill of
" complaint of Hetty H. R. Green this day filed in the
" Clerk's office of said Court, in said City of Chicago,
" then and there to receive and abide by such judgment
" and decree as shall then or thereafter be made, upon
" pain of judgment being pronounced against you by
" default.

" To Marshal of the Northern District of Illinois to
" execute.

"Witness the Hon. Morrison R. Waite, Chief Justice
" of the Supreme Court of the United States of America,
" at Chicago aforesaid, this 27th day of No-
[SEAL] " vember, in the year of our Lord one thous-
" and eight hundred and seventy-five, and of
" our Independence the 100th.

" WM. H. BRADLEY, *Clerk.*

"MEMORANDUM."

"The above-named defendants are notified that unless "they and each of them shall enter their appearance in "the Clerk's office of said Court, at Chicago aforesaid, "on or before the day to which the above writ is return- "able, the complainant's bill will be taken against them "as confessed and a decree entered accordingly.

"WM. H. BRADLEY, *Clerk*."

(Tr., 53 and 54.)

On January 6th, 1876, the Marshal of the District filed his return showing the manner in which he had served this subpœna, and that portion of the return which is material to the issue reads as follows:

"I have served the annexed writ by personally de- "livering a true and correct copy thereof to each of the "following named defendants on the day set opposite "their names:

"Upon William F. Milligan, Monroe Heath, Bradford "Hancock, Joseph K. Barry, John W. Clapp, Lewis L. "Coburn, Jonathan Goodwin, Jr., John B. Adams, "Clark Lipe, David A. Gage, Julius White, and William "F. Tucker as guardian, and William F. Tucker as ex- "ecutor, on the 8th day of December, A. D. 1875."

(Tr., 54.)

On April 5th, 1876, an order was entered reciting that certain defendants had entered their appearances in this cause, "and that due and legal personal service has been "had upon all the other and remaining defendants in

" this cause by service of subpoena in this cause upon
" them respectively, and that each and all the defend-
" ants in this cause are now legally before this Court
" and subject to its jurisdiction, and that neither of said
" defendants have pleaded, answered or demurred there-
" in, excepting the following named defendants: George
" W. Gage, Jr., and David A. Gage, children of said
" George W. Gage, deceased, who have answered by
" their guardian *ad litem*, heretofore duly appointed by
" this Court; John N. Jewett, Charles T. Adams, The
" Tobey Furniture Company, Monroe Heath and Will-
" iam F. Milligan and Charles Tobey, on motion of com-
" plainant's solicitor, it is ordered that each and all of
" said defendants who have not pleaded, answered, or
" demurred as aforesaid, namely, Sarah H. Gage, Eva
" Gage, Mary B. Gage, Carrie E. S. Gage, Alice Gage,
" William F. Tucker, Joseph K. Barry, John W. Clapp,
" Lewis L. Coburn, David A. Gage, John A. Rice, Ben-
" jamin E. Gallup, Francis B. Peabody, George L. Pad-
" dock, Julius White, Jonathan Goodwin, Jr., the Me-
" chanics National Bank of Chicago, the Illinois Trust
" and Savings Bank, Moore C. White, Charles H. Gau-
" bert, James E. Gross, the Chicago File Company,
" Charles M. Smith, Bradford Hancock, William Coffin,
" Alexander A. McDonnell, Charles A. Mather, Alexan-
" der S. Maltman, George F. Morcom, Clark Lipe,
" John B. Adams, David Kenley, George R. Jenkins,
" Charles F. Swift, Crane Bros. Manufacturing Com-
" pany, August Shiffer, the First National Bank of
" Sioux City, do plead, answer or demurr to the bill of

" complaint in this cause instanter; and said last named " defendants having each been three times called so to do, " come not, but make default, and it is hereby ordered, " adjudged and decreed that as to each of said defend- " ants last named and so making default as aforesaid " said bill of complaint and the matters and things " therien contained be taken as and for confessed." It was further ordered that the cause be referred to Henry W. Bishop as Master in Chancery to take proofs herein and report same to the Court. (Tr., 71 and 72.)

On July 31st, 1876, the final decree of sale was entered wherein it is recited " this cause having this day been " brought on to be heard upon the bill of complaint filed " herein, taken as confessed by all of the defendants, ex " cept," etc., naming certain defendants not including Tucker. (Tr., 79.)

The decree ordered the amount of the mortgage to be paid within 100 days from the date of the entry of the decree and the payment not having been made the sale was made on the 7th day of December, 1876, and the property was bought in by the appellee herein, Hetty H. R. Green, and the sale was duly confirmed and the final decree of foreclosure entered on February 2nd, 1877, wherein the equity of redemption of the parties to the cause and all persons holding under them was decreed to be forever barred. (Tr., 92 and 93.)

BRIEF.

A motion has been hereinbefore made to dismiss this case for want of jurisdiction in this Honorable Court, on the ground that the jurisdiction of the United States Circuit Court in this case depended entirely upon a diversity of citizenship, so that the right of appeal to this Court expired on the 1st day of July, 1892.

We beg to submit the following propositions in support of the judgment of the Court below, in the order in which they must properly be considered under the rule heretofore laid down by this Court.

I.

THE JURISDICTION OF THE SUPREME COURT.

First—The jurisdiction of the Circuit Court was invoked on account of, and was entirely dependent upon, the diversity of citizenship of the real parties to the controversy, and the appeal herein not having been taken until after the 1st of July, 1892, this Court has no jurisdiction.

Second—Under the rule established by this Court, the complainant's bill will alone be looked to to determine whether or not the cause is one arising under the Constitution, laws or treaties of the United States, and the complainant's bill in this case failing to present any such question, and failing to make mention of the "Constitu-" tion or any law of the United States, or any claim or " right under either," it must be held that this cause be-

longs to that class of cases in which the jurisdiction of the United States Court must depend upon the diversity of citizenship, and in which the right to appeal to this Court expired on the 1st day of July, 1892.

II.

JURISDICTION OF THE CIRCUIT COURT.

First—The real and only controversy involved in this cause was whether or not the complainant John Evans Cornell was entitled to redeem the premises in question, and the determination of this question depended upon, first, the effect to be given to the foreclosure and sale in the case of Green vs. Gage; second, whether Tucker and his heirs and assigns had not lost by delay whatever right of redemption they might have had, and the only parties to these questions and the controversy were John Evans Cornell, the complainant, a citizen of Illinois, and Hetty H. R. Green, the defendant, a citizen of Vermont; and there was, therefore, a controversy in the case which was wholly between the said complainant Cornell, and the said defendant Hetty H. R. Green, which could be fully determined between them, and the cause was therefore properly removed to the United States Circuit Court.

Second—The trustees named in the trust deed were mere nominal parties, at best, and under the circumstances of this case we submit were really unnecessary and, probably, improper parties to the proceedings, as all the right and title which they may have had under

the trust deeds had certainly been divested by the foreclosure proceedings and sale thereunder.

Third—The tenants under Hetty H. R. Green, while they were proper parties to the proceedings, really had no interest in and no right to be heard upon the issues between the complainant Cornell and the defendant Hetty H. R. Green, and the fact that they were residents of the same State as the complainant did not deprive the said Hetty H. R. Green of her right of removal.

III.

MERITS OF THE CASE.

First—William F. Tucker was in fact personally made a party to the bill in the foreclosure proceedings in the case of Green vs. Gage, and was duly served with process therein so that he and his heirs and his assigns are bound by the decree in that case, and their equity of redemption is forever barred by the foreclosure and sale therein.

Second—If the bill, process, and return of service, in the case of Green vs. Gage are capable of two constructions, this Court will, by reason of the lapse of time, the evident increase of the value of the property, the intervening death of Tucker, and all of the facts and circumstances shown by the record in this cause, adopt the construction which will uphold and give effect to the decree, foreclosure and sale in the said case of Green vs. Gage.

Third—If the alleged imperfections and irregularities in the bill and process and service thereof in the case of

Green vs. Gage had, in fact, really existed and their existence had conferred upon William F. Tucker, or his heirs or assigns, any right to equitable relief, such as is sought in this case, their right has, under the circumstances disclosed by the record, been lost by the long delay for which, in the bill, no excuse is offered.

With the permission of the Court we will now brief the questions presented for the consideration of this Court in the order in which they are above stated:

I.

THE JURISDICTION OF THE SUPREME COURT.

FIRST—THE JURISDICTION OF THE UNITED STATES COURT WAS INVOKED ON ACCOUNT OF, AND WAS ENTIRELY DEPENDENT UPON, THE DIVERSITY OF CITIZENSHIP OF THE REAL PARTIES TO THE CONTROVERSY, AND THE APPEAL HEREIN NOT HAVING BEEN TAKEN UNTIL AFTER THE FIRST OF JULY, 1892, THIS COURT HAS NO JURISDICTION.

The question presented by the foregoing proposition has been heretofore fully and ably briefed by eminent counsel on behalf of this appellee, and the decisions of this Court upon the question are fully presented by the counsel in their brief on the motion to dismiss and the rule laid down in the authorities cited in support of the said motion is affirmed in the late case of Lutcher et al. vs. United States, 157 U. S., 427. In the brief and argument hereinbefore filed at the time the said motion to dismiss was submitted, the counsel for the appellant

have practically conceded that the authorities cited in support of the motion to dismiss unquestionably establish the rule that if the jurisdiction of the United States Circuit Court was entirely dependent upon the diversity of citizenship of the parties, the appeal to this Court was taken too late and the motion should prevail. It is, however, contended upon the part of the appellant that this cause does not belong to that class of cases wherein the jurisdiction of the Federal Court depends entirely upon the diversity of citizenship, but that it does belong to that class of cases wherein there is a Federal question to be determined, requiring the application or construction of a provision of the Constitution of the United States. We reply to this contention upon the part of the appellant under the second proposition under this head.

SECOND—UNDER THE RULE ESTABLISHED BY THIS COURT, THE COMPLAINANT'S BILL WILL ALONE BE LOOKED TO TO DETERMINE WHETHER OR NOT THE CAUSE IS ONE ARISING UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES, AND THE COMPLAINANT'S BILL IN THIS CASE FAILING TO PRESENT ANY SUCH QUESTION, AND FAILING TO MAKE MENTION OF THE "CONSTITUTION OR ANY LAW OF THE UNITED STATES, OR ANY CLAIM OR RIGHT UNDER EITHER," IT MUST BE HELD THAT THIS CAUSE BELONGS TO THAT CLASS OF CASES IN WHICH THE JURISDICTION OF THE UNITED STATES COURT MUST DEPEND UPON THE DIVERSITY OF CITIZENSHIP, AND IN WHICH THE RIGHT TO APPEAL TO THIS COURT EXPIRED ON THE 1ST DAY OF JULY, 1892.

Tennessee vs. The Bank of Commerce, 152 U. S., 454; Chappell vs. Waterworth, 155 U. S., 107; Postal Telegraph Cable Co. vs. Alabama, 155 U. S., 482; Carey vs. Houston & Texas Central Railroad, 150 U S., 181.

The rule which seems to be established by this Court in the cases above cited is that for all jurisdictional questions, and in construing the removal act, this Court will, for the purpose of determining whether the cause is one arising under the Constitution, or laws or treaties of the United States, look alone to the plaintiff's petition or complaint. It is true that the rule was applied in most of the cases cited for the purpose of determining the jurisdiction of the Circuit Court, but it is also true that it is the rule which has been adopted by this Court for classifying cases for jurisdictional purposes.

If the case at bar is to be classified under this rule, and we look to the complainant's bill for the purpose of determining this question, we find that it is an ordinary bill seeking to redeem mortgaged premises, in which it is alleged that a foreclosure proceeding was had to which William F. Tucker, who was the owner of the property, was not made a party, and that, therefore, his equity of redemption was not thereby barred. This bill simply presents a case for ordinary equity cognizance which would be tried and settled by the rules of equitable jurisprudence and involving by no possibility either the construction or application of any provision of the Constitution of the United States. It may be said of this case as was said by Mr. Justice Gray in the case of the Postal

Telegraph Cable Co. vs. Alabama, above cited, that "the " complaint by which the suit was begun did not mention " the Constitution or any law of the United States, or any " claim or right under either." (Page 478).

It is said in the case of Chappel vs. Waterworth, above cited, that "the declaration is in the ordinary form of an " action of ejectment between individuals, merely de- " scribing the land and alleging the ouster of the plaintiff " by the defendant. It does not show that either party " claims any right under the Constitution or laws of the " United States, or that the government of the United " States or any third party claims or asserts any title or " right to the land in controversy. So far as the decla- " ration shows, the only question in the case might be " merely whether the plaintiff has any title, or whether " the defendant has taken possession." So it may be said in this case that the complaint is in the ordinary form of a bill to redeem mortgaged premises, and the only question presented by the bill is whether or not the defendant Tucker was made a party to the foreclosure proceedings, and whether he, his heirs or assigns, have, or not, the right to redeem the premises. The complainant in this case claimed no right in his bill of complaint under the Constitution, laws or treaties of the United States. It is true that the proceedings in the case of Green vs. Gage are referred to and made exhibits to the bill in this case, and that it appears from the examination of the exhibits that the Court must determine whether or not the allegations in the bill in the case of Green vs. Gage were sufficient to make William F. Tucker defendant in the

foreclosure suit in his individual capacity and whether the subpœna was sufficient to bring him into Court in that capacity, but the determination of these issues does not give rise to a Constitutional question. The only question which was determined by the Court below was that William F. Tucker was in fact made a party personally to the foreclosure proceedings, and was bound thereby, and in the determination of this question neither the construction nor application of any provision of the Constitution of the United States was in any manner involved. There is no provision in the Constitution of the United States which would aid the Court in determining that question, and none was referred to.

The language of this Court in the case of Carey vs. Houston & Texas Central Railroad, above cited, is directly applicable to the question now under consideration. This Court says in the case above referred to :

" The bill before us refers to no provision of the Con-
" stitution upon which complainants relied to invoke the
" action of the Court in vindication of their supposed
" rights, or which was presented to be construed or
" applied by the Court. No question upon such con-
" struction or application was raised between the parties
" upon the record, or determined by the decree of the
" Circuit Court.

" It is argued that the record shows that complainants
" had been deprived of their property without due pro-
" cess of law, by means of the decree attacked, but be-
" cause the bill alleged irregularities, errors, and juris-

" dictional defects in the foreclosure proceedings, and " fraud in respect thereof and in the subsequent trans- " actions, which might have enabled the railroad com- " pany upon a direct appeal to have avoided the decree " of sale, or which, if sustained on this bill, might have " justified the Circuit Court in setting aside that decree, " it does not follow that the construction or application " of the Constitution of the United States was involved " in the case in the sense of the statute. In passing " upon the validity of that decree the Circuit Court " decided no question of the construction or the appli- " cation of the Constitution, and, as we have said, no " such question was raised for its consideration."

We submit the foregoing authorities and suggestions in reply to the argument which has been hereinbefore filed on behalf of the appellant in opposition to the motion to dismiss this appeal, and we submit that under the authorities above, it must be held that this is a cause wherein the jurisdiction of the Federal Court depends entirely upon the diversity of citizenship of the parties, and which does not, so far as the record discloses, involve either the application or construction of any provision of the Constitution of the United States, and inasmuch as the appeal was herein taken after the 1st of July, 1892, this Court has no jurisdiction of this cause and the motion to dismiss should be sustained.

II.

JURISDICTION OF THE CIRCUIT COURT.

FIRST—THE REAL AND ONLY CONTROVERSY INVOLVED IN THIS CAUSE WAS WHETHER OR NOT THE COMPLAINANT JOHN EVANS CORNELL WAS ENTITLED TO REDEEM THE PREMISES IN QUESTION, AND THE DETERMINATION OF THIS CONTROVERSY DEPENDED UPON, FIRST, THE EFFECT TO BE GIVEN TO THE FORECLOSURE AND SALE IN THE CASE OF GREEN VS. GAGE; SECOND, WHETHER TUCKER AND HIS HEIRS AND ASSIGNS HAD NOT LOST BY DELAY WHATEVER RIGHT OF REDEMPTION THEY MIGHT HAVE HAD, AND THE ONLY PARTIES TO THESE QUESTIONS AND THIS CONTROVERSY WERE JOHN EVANS CORNELL, THE COMPLAINANT, A CITIZEN OF ILLINOIS, AND HETTY H. R. GREEN, THE DEFENDANT, A CITIZEN OF VERMONT; AND THERE WAS, THEREFORE, A CONTROVERSY IN THE CASE WHICH WAS WHOLLY BETWEEN THE SAID COMPLAINANT, CORNELL, AND THE SAID DEFENDANT, HETTY H. R. GREEN, WHICH COULD BE FULLY DETERMINED BETWEEN THEM, AND THE CAUSE WAS THEREFORE PROPERLY REMOVED TO THE UNITED STATES CIRCUIT COURT.

SECOND—THE TRUSTEES NAMED IN THE TRUST DEED WERE MERE NOMINAL PARTIES, AT BEST, AND UNDER THE CIRCUMSTANCES OF THIS CASE WE SUBMIT, WERE REALLY UNNECESSARY AND IMPROPER PARTIES TO THE PROCEEDINGS, AS ALL THE RIGHT AND TITLE WHICH THEY MAY HAVE HAD UNDER THE TRUST DEEDS HAD CERTAINLY BEEN DIVESTED BY THE FORECLOSURE PROCEEDINGS AND SALE THEREUNDER.

It appears from the transcript in this case that while the motion to remand was argued and submitted to Judge Blodgett, there was no order over-ruling the motion, but the Court proceeded to hear the case on its merits.

The assignment of errors does not raise the question of the jurisdiction of the Circuit Court, and it is possible that this motion to remand has been abandoned by the appellant, but inasmuch as this Court will, of its own motion, look into all jurisdictional questions, and inasmuch as this question is raised by the record, it is deemed proper to consider it fully in this brief.

The complainant claims title by deed dated January 25th, 1890, from the heirs of William F. Tucker, deceased, and seeks to redeem from a foreclosure under a decree of this Court upon the ground that William F. Tucker was not made a party defendant in said cause.

In addition to the defendant, Hetty H. R. Green, who is alleged to be the holder of the title under the foreclosure, there are made defendants Benjamin E. Gallup and Julius White, trustees, in certain trust deeds, and the other defendants named are all stated to be tenants of Mrs. Green.

The allegation of the bill is, that White *was* the trustee, etc., under a certain trust deed, and that Gallup *was* the trustee under a certain trust deed, but it is conceded that they have no interest in the premises, and were not necessary parties to the suit. Their title was necessarily cut off by the decree of foreclosure.

The bill alleges a foreclosure of said trust deeds by a decree of this Court, and a sale and conveyance by the

Master in Chancery under said decree, all of which, the bill alleges, will more fully appear "from the orders and "records of the Circuit Court of the United States for "the Northern District of Illinois and the files of said "cause, reference to which is hereto had for more par- "ticularity," * * * "all of which records and files "are made a part of this bill and referred to for greater "certainty." The only defect in the proceedings alleged is that William F. Tucker was not made a party defendant to the bill, and it is alleged that he was the owner of the equity of redemption.

The omission of the owner of the equity could not affect the validity of the proceedings as to the parties to the suit. The only effect of it would be that he would not be bound by the decree. This is well settled by the decisions in the State of Illinois.

In a suit to foreclose a mortgage, where the mortgagor was made a defendant, but a subsequent purchaser from him was not made a party, it was held that the decree was not for that reason void, although the right to redeem remained unaffected by the decree.

The Court says: "What was the condition of the "parties at the time? The mortgagee was the owner of "the fee as against the mortgagor and all who claimed "under him, and might have recovered the premises in "ejectment against them. (Carrol vs. Ballance, 26 Ill., "9; Nelson vs. Pinegar, 30 Ill., 473.) The mortgagor "and his assignees had only the right of redemption, for "there had been a forfeiture of the condition of the mort- "gage. This right is purely equitable, created by courts

" of equity, and can only be asserted in them. While " it is true that the complainant, as the assignee of the " mortgagee, did not receive the legal title, yet the " assignment of the debt carried with it, in equity, as an " incident, all the interest of the mortgagee in the land " mortgaged. The foreclosure and sale thereunder " vested the legal estate in the purchaser, subject to any " equity which had not been barred. After condition " broken, the party holding the equity of redemption " might have exercised his right upon equitable terms. " After foreclosure, if he was not a party, he has the " same right.

" Concede that the decree did not affect the right of " redemption, still it should not be declared absolutely " void. The decree and sale may be upheld, and at the " same time the equity of redemption maintained. The " mortgagor was a party to the decree, the sale was fair " and regular, and the purchaser at the judicial sale " should be protected.

" The right to redeem may subsist without pronounc- " ing the decree void, and the possession, consequent " upon the purchase, a trespass.

" This is the effect of the decision in Ohling vs. Luit- " jens, 32 Ill., 23. The Court held that as the owner " of the redemption was not a party, his right to redeem " was unaffected by the decree, and that he was enti- " tled to the advantages belonging to his position.

" In Cutter vs. Jones, 52 Ill., 85, the case in 32d was " referred to, and the same construction given; and it " was held that a decree of foreclosure was not void be-

" cause a subsequent purchaser from the mortgagor was
" not a party to the proceeding.

" The grantee of the mortgagor was barred of no right
" by the foreclosure. He has not been injured or de-
" prived of any equity, and upon no principle of law
" ought he to be permitted to dispute the title for the
" reason assigned."

Kelgour vs. Wood, 64 Ill., 345.

This case is directly in point, for it will be noticed that the complainant was not the mortgagee, but the assignee of the mortgagee, yet the Court says although he did not have the legal title which remained in the mortgagee, the effect of the decree and sale was to vest the legal title in the purchaser. In other words, the debt having been assigned to complainant, and the legal title remaining in the mortgagee, he held the legal title as a mere trustee for the benefit of the complainant, and stood therefore in the same position exactly as the trustees in this case.

In another case the Supreme Court of Illinois says that
" the failure to make the purchaser from the mort-
" gagor a party to a proceeding to foreclose the mort-
" gage does not affect the validity of the decree, but his
" right of redemption is unaffected by it."

Taylor vs. Adams, 115 Ill., 570.

In the case last cited, which was an action of ejectment, it will be noticed by the statement of the case that the bill to foreclose was filed by the assignee of the notes,

the legal title apparently remaining in the mortgagee, yet the effect of the foreclosure was to transfer the legal title to the purchaser at foreclosure sale, even though the owner of the equity was not a party to the suit. The interest of the mortgagee after the assignment of the notes was the bare legal title held in trust to secure the debt.

So in a later case, where it was claimed that there were others interested in the property who ought to be made parties, the Court says that if there are any such parties they will not be bound by the decree. "But "that ought not, so far as we can see, prevent the fore- "closure as to the interest of the defendants."

Mix vs. The People, 116 Ill., 265.

It has been held in Illinois that where a trustee under a trust deed makes a sale in violation of his duty, it passes the legal title to the grantee. The relief is in equity.

Koester vs. Burke, 81 Ill., 436.

The omission of a necessary party to a foreclosure does not affect the decree as to other parties. This, we think, is the general rule. "The utmost that could be said "would be that his right of redemption, if any existed, "from the sale under the decree, was not barred or cut "off by a proceeding to which he was not a party."

Fitch vs. Wetherbee, 110 Ill., 475.

This case is not at all analogous to the case of Evans vs. Faxon, 10 Fed. Rep., 312, decided by Judge Drum-

mond, in which he held a trustee a necessary party because the trustee might be responsible if the sale by him had been improperly made, for in this case the trustees could in no event be held responsible. They have done nothing voluntarily. They have not assumed to act. They are protected by a decree of the Circuit Court. The legal title held by them has been divested by a sale under the order of the Court, and if complainant has any relief in equity, it is against appellee, Green, who now holds the legal title.

No relief is asked against the trustees, except that they release the trust deeds. Having no legal title they could not do this, and there would be no necessity for it. If the right of redemption exists, the Court could direct a conveyance by the appellee Green, who holds the legal and equitable title, and do complete justice without the intervention of the trustees. Therefore, they are not necessary parties, nor proper parties. They have no interest whatever in the premises.

The bill prays for an account of rents received by Hetty H. R. Green, and that complainant may be allowed to redeem, and that the defendants be decreed to surrender and deliver up possession of the premises to complainant, and that the decree entered in this Court may be declared a cloud upon complainant's title to the premises, and set aside as null and void as to complainant's interest, etc.

The question presented arises under the act of 1875 as amended by the act of March 3rd, 1887, and corrected by the act of the 13th of August, 1888.

So far as the question in this case is concerned, the decisions under the act of 1875 are applicable, the effect of the amendment of 1887 being simply to give the right of removal to a defendant being a non-resident.

Chief Justice Waite states the rule: "To entitle a "party to a removal under the second clause of the sec- "ond section of the act, there must exist in the suit a "separate and distinct cause of action, on which a sepa- "rate and distinct suit might properly have been brought "and complete relief afforded as to such cause of action "with all the parties on one side of the controversy "citizens of different States from those on the other. "To say the least, the case must be one capable of sepa- "ration into parts, so that in one of the parts a contro- "versy will be presented with citizens of one or more "States on one side, and citizens of other States on the "other, which can be fully determined without the "presence of any of the other parties to the suit as it "has been begun."

Frasier vs. Jennison, 106 U. S., 191.

Where a township and a taxpayer thereof filed a bill against certain State, county and township officers and the unknown owners and holders of township bonds, and it appeared that a citizen of another State was the owner of all of them, and he appeared and was made a defendant, it was held, that he was entitled under the act of March 3, 1875, to remove the suit to the United States Court.

The Court says: "He alone, of all the parties, is in a " legal sense interested in the enforcement of liability " upon the township. It is therefore a suit in which "there is a single controversy embracing the whole suit " between citizens of different States, one side of which " is represented alone by Kernochan, a citizen of Massa- " chusetts, and the other by citizens of Illinois."

Harter vs. Kernochan, 103 U. S., 562.

Judge Blodgett, in remanding a case, has stated the rule as follows: "It is not enough that citizens of dif- " ferent States must be interested in the same issue or " question or controversy which arises in the course of " the case, but they must have such an interest that " when the question to which they are parties is settled, " the suit is thereby determined." And, again, that to entitle a non-resident to removal, his interest must be such "that the determination of his or her interest may " determine the whole suit or controversy, in which " event the right of a removal would undoubtedly exist."

Carraher vs. Broman, 7 Biss., 492.

Applying the same test to this case, it will be seen that the determination of the controversy between the complainant and Hetty H. R. Green will determine the whole suit or controversy.

Judge Drummond, in construing this act, comes to the conclusion that where there is a controversy wholly between citizens of different States, even though it be not the principal controversy, yet the case may be removed, and the removal takes the whole case.

Farmers L. & T. Co. vs. Chi. P. & S. R. R., 9 Biss, 133.

Judge Bunn, also, in construing this act, came to the same conclusion.

Sheldon vs. Keokuk N. L. P. Co., 9 Biss., 307.

The Supreme Court has held that where the complainants are citizens of one State, and the defendant, who is the real party to the controversy and against whom relief is sought, is a citizen of another State, his right to remove can not be defeated upon the ground that the citizenship of another defendant, who is a stranger to that controversy and who occupies the position of a garnishee, is the same as that of the complainant.

Bacon vs. Rives, 106 U. S., 99.

THIRD—THE TENANTS UNDER HETTY H. R. GREEN, WHILE THEY WERE PROPER PARTIES TO THE PROCEEDINGS, REALLY HAD NO INTEREST IN AND NO RIGHT TO BE HEARD UPON THE ISSUES BETWEEN THE COMPLAINANT CORNELL, AND THE DEFENDANT, HETTY H. R. GREEN, AND THE FACT THAT THEY WERE RESIDENTS OF THE SAME STATE AS THE COMPLAINANT DID NOT DEPRIVE THE SAID HETTY H. R. GREEN OF HER RIGHT OF REMOVAL.

In the case of Green vs. Klinger, 10 Fed. Rep., 689, it was held by Judge Pardee, that there was a seperable controversy between the warrantor and the plaintiff and the attitude of the other defendants being grantees of the warrantor was likened by the learned Judge to the attitude of the tenant toward the landlord.

In the case of the State of Texas vs. Lewis, 12 Fed. Rep., 1-7, Judge McCormick held that, while it might be possible that the plaintiff would have, for certain purposes of the action, the right to have the actual occupier of the premises retained as a defendant, that it seemed clear to the learned Judge that within the meaning of the acts of Congress on the subject of removal, the tenant was a mere nominal party whose presence as tenant on the property could not defeat the right of the real defendant in the controversy to have the same heard and determined by this Court; and in the same case, 14 Fed. Rep., 65, Judge Pardee concurred in the denial of the motion to remand.

In the case of Kerling vs. Cotzhausen et al., 16 Fed. Rep., 705, Judge Drummond rendering the opinion of the Court, Judge Blodgett and Justice Harlan concurring, held that :

" In all of the cases which have been decided where " one or more of the defendants were citizens of the " same State as the plaintiff, and one or more were not, " and it has been held that the cause could not be re- " moved, it was for the reason that all of the defendants " were indispensable parties, or where the controversy " grew out of a contract."

In the case of Barney vs. Latham, 103 U. S., 210, Justice Harlan delivering the opinion of the Court, in speaking of the removal act of 1866, says:

" It proceeds, plainly, upon the ground, among others, " that a suit may, under correct pleading, embrace sev- " eral controversies, one of which may be between the " plaintiff and that defendant who is a citizen of a State " other than that in which the suit is brought; that to " the final determination of such separate controversy " the other defendants may not be indispensable parties; " that in such a case, although the citizen of another " State, under the particular mode of pleading adopted " by the plaintiff, is made a co-defendant with one whose " citizenship is the same as the plaintiff's, he should " not, as to his separable controversy, be required to re- " main in the State Court, and surrender his constitu- " tional right to invoke the jurisdiction of the Federal " Court; but that, at his election, at any time before the " trial or final hearing, the cause, so far as it concerns " him, might be removed into the Federal Court, leaving " the plaintiff, if he so desires, to proceed in the State

" Courts against the other defendant or defendants." And in speaking of the act of 1875, in this same case, it is said:

" It was often convenient to embrace in one suit all " the controversies which were so far connected by their " circumstances as to make all who sue, or are sued, " proper, though not indispensable parties. Rather than " split up such a suit between courts of different juris- " dictions, Congress determined that the removal of the " separable controversy to which the judicial power of " the United States was, by the Constitution, expressly " extended, should operate to transfer the whole suit to " the Federal Court." And again, "A defendant may " be a proper, but not an indispensable, party to the re- " lief asked. In a variety of cases it is in the discretion " of the plaintiff as to whom he will join as defendants. " Consistently with established rules of pleading he " may be governed often by considerations of mere con- " venience; and it may be that there was, or is, such a " connection between the various transactions set out in " the complaint as to make all of the defendants proper " parties to the suit, and to every controversy embraced " by it, at least, in such a sense as to protect the com- " plaint against a demurrer upon the ground of multi- " fariousness or misjoinder."

In the case of Edgerton & Doane vs. Gilpin, 3 Woods, 277-281, Mr. Justice Bradley in speaking of the question of formal parties, says:

" I do not think that the making of them formal par- " ties changed the character of the suit, as a suit be-

" tween citizens of New York on one side and citizens " of Texas on the other. They were the only real liti- " gants in the cause. It is really and truly and only a " litigation between them, and we should have been in- " clined to think that the cause was properly removed, " at the time it was removed, notwithstanding this ob- " jection."

In the case of Wood vs. Davis, 18 How., 467-469, the Court says:

"It has been repeatedly decided by this Court, that " formal parties, or nominal parties, or parties without " interest, united with the real parties to the litigation, " can not oust the Federal Courts of jurisdiction, if the " citizenship, or character of the real parties, be such as " to confer it within the 11th section of the judiciary act. " (7 Cranch, 98; 3 Ib., 267; 8 Wheat., 421; 5 " Cranch, 303.)"

The following note to the case of Deford, Hinkle & Co. vs. Mehaffy et al., is found in the 14 Fed. Rep., 181:

"Nominal parties are not to be treated as parties, " although made parties, to the suit (Livingston vs. Gib- " bons, 4 Johns. Ch., 94; James vs. Thurston, 6 R. I., " 428); so, if a citizen of the State where suit is brought " is not a necessary party, and his presence is not essen- " tial, the non-resident defendant may remove, although " the former does not unite in the petition (Hatch vs. " Chicago, R. I. & P. R. Co., 6 Blatchf., 105; Ex parte " Girard, 3 Wall. Jr., 263; Hadley vs. Dunlap, 10 Ohio " St., 1; Livingston vs. Gibbons, 4 Johns. Ch., 94); and " if all the defendants join but one, and that one is an

" unnecessary party, the cause may be removed (Cooke " vs. Seligman, 7 Fed. Rep., 263.) The right to a re- " moval is not affected by the fact that a defendant, a " citizen of the same State, is a proper but not an indis- " pensable party to a seperable controversy. (Barney vs. " Latham, 103 U. S., 205.) So, where a landlord, the " real owner, assumes the defence, he makes himself a " party and, being the real defendant, may remove the " cause if he has the requisite citizenship (Green vs. " Klinger, 10 Fed. Rep., 689; Wilber vs. Nat. Bank, 12 " Chi. Leg. N., 75); and so where a tenant disclaims " title and has the landlord substituted as defendant " (State vs. Lewis, 12 Fed. Rep., 1, and note, page 7; " see Allin vs. Robinson, 1 Dill., 119; Relfe vs. Rundle, " 103 U. S., 222; Chaffraix vs. Board of Liquidation, 11 " Fed. Rep., 638.) Where a married woman, sole owner " of a patent, brings suit thereon for an infringement, " her husband need not be a party. Lorrillard vs. Stand- " ard Oil Co., 18 Blatchf., 199.)

" Where the real party to a controversy is clearly en- " titled to have his rights passed upon by the Courts of " the United States, he is entitled to remove, although " the nominal party has no such right (Cohens vs. Vir- " ginia, 6 Wheat., 264), and though the nominal party " be a party on the record. (Green vs. Klinger, 10 Fed. " Rep., 689.) So, in ejectment, the sole owner may " remove, although his grantor, a citizen of the same " State as plaintiff, is a party. (Calloway vs. Ore Knob " Co., 74 N. C., 200.) Officers of a corporation, joined " as defendants in equity, but as to whom no relief is

" prayed, are nominal parties, such as will not defeat the " right to a removal. (Hatch vs. Chicago, R. I. & P. " R. R. Co., 6 Blatchf., 105; and see Pond vs. Sibley, " 7 Fed. Rep., 129; Nat. Bank of Lyndon vs. Wells " Riv. Manuf'g Co., 7 Fed. Rep., 750.) State and " county officers are not necessary parties to a contro- " versy relating to the validity of bonds. (Town of " Aroma vs. Auditor, 2 Fed. Rep., 33.) Jurisdiction is " not defeated by joining as nominal parties the exe- " cutors of a deceased person, citizens of the same State, " as complainant. (Walden vs. Skinner, 101 U. S., 577.) " A garnishee is not a party to the suit, as proceedings " in garnishment process are but incident to the suit. " Cook vs. Whitney, 3 Woods, 715. See Ellis vs. Sis- " son, 11 Fed. Rep., 353.—Ed.")

Upon a bill for an injunction against the use of certain wharf property being brought against the defendants, they "call in warranty" upon the legal owners of the property to defend the case, the original defendants being mere licensees. The original defendants were citizens of the same State as the plaintiff, and the legal owners citizens of another State. It was contended that the United States Court had no jurisdiction, but the Court held that the case could be fully determined as between the plaintiff and the legal owners without the presence of the original defendants, and hence there was a controversy wholly between citizens of different States.

Elleman vs. M. G. M. & T. R. R. Co., 2 Woods, 120.

The authorities upon this question have been collected in the fifth edition of "Dillon's Removal of Causes,"

Chapter 10. On page 52 he says: "It is now the set-
" tled doctrine of the United States Courts that when a
" separable controversy is removed, the whole suit is
" carried with it, and no part thereof is left to the deter-
" mination of the State Court."

And again, on page 53 he says: " Under the clause
" we are considering, the true test is the possibility of
" detaching from the suit a controversy which is wholly
" between citizens of different States, and which can be
" finally determined without the presence of the other
" parties."

Applying the principles laid down by the cases cited to the present case it seems to be clear that this cause was properly removed to the United States Circuit Court. In this case the main controversy and in fact the only real controversy, is between the complainant and the defendant, Hetty H. R. Green. The trustees are not only unnecessary but indeed improper parties to the proceedings and while the tenants may be proper parties they are not only not indispensable but they are wholly unnecessary to the determination of the controversy between the complainant and the defendant, Hetty H. R. Green.

It is alleged in the bill that the deed to Tucker and the deed from Tucker's heirs to the complainant were duly recorded and the records in the case of Green vs. Gage speak for themselves and there is absolutely nothing that the tenants can do or say or plead which can by

any possibility aid the Court in the determination of the controversy existing between the real parties, Cornell and Hetty H. R. Green.

The questions which were to be determined in this litigation involved the ascertainment of the force and effect which was to be given to the decree, foreclosure and sale in the case of Green vs. Gage as against Tucker and his heirs and assigns.

The tenants were absolute and complete strangers to the foreclosure proceedings and to each and every controversy growing out of the same. They took no part in and had no interest in these proceedings for foreclosure. The adjudication of the questions as to the force and effect of these proceedings as against Tucker and his heirs and assigns would of necessity be exactly the same whether the tenants were or were not parties to the suit. The other and substantially the only other question which could be adjudicated by the Court in this case was as to whether, if Tucker or his heirs or assigns ever had any right to redeem these premises since the foreclosure sale, the same had not been lost by delay.

In the determination of this question no other parties to the suit could possibly take any part or have any right to be heard save and except the complainant and the defendant, Hetty H. R. Green. It is true the determination of these questions might possibly affect in some remote manner some interest of the tenants. It may possibly be that the result of the decision of these questions would be that that the tenants would be ousted from possession of these premises, but that fact can not have the slight-

est effect upon the determination of the real controversy between the complainant and the defendant, Hetty H. R. Green. If the fact that the result of the controversy between the real parties would, in some remote manner, affect the interest of some party who was a citizen of the same State as the complainant would prevent the removal of the case, it would be necessary for this Court to lay down the rule that whenever any party to the suit is a proper party and is a citizen of the same State as complainant, the real party to the controversy, although being a citizen of another State, would not have the right of removal; for it is impossible to find a case in which one could be a proper party and whose interest would not in some manner, directly or indirectly, be affected by the determination of the cause. The rule, however, which has been laid down by this Court in the cases cited, is directly to the contrary and this Court holds that even though one may be a proper party to the suit if he be not an indispensable party to the determination of the controversy between the real litigants his citizenship will not prevent the removal of the cause.

For the purpose of determining the question as to whether the complainant Cornell had the right to redeem these premises by paying to the defendant Hetty H. R. Green whatever sum might be found to be due her upon an accounting, it certainly was not necessary that the tenants should be parties. It is probable, however, as is stated by this Court in the case of Barney vs. Latham above cited that it was convenient "to embrace "in one suit all the controversies which were so far con-

" nected by their circumstances as to make all who sue, " or are sued, proper, though not indispensable, parties." It is also true as stated in the same case that in the case at bar it was in the "discretion of the plaintiff as to " whom he will join as defendants; consistently with the " established rules of pleading he may be governed often " by considerations of mere convenience; it may be that " there was, or is, such a connection between the various " transactions set out in the complaint as to make all of " the defendants proper parties to the suit, and to every " controversy embraced by it—at least, in such sense as " to protect the complainant against a demurrer on the " ground of multifariousness or misjoinder." And it may also be true as is said by Judge McCormick in the case of the State of Texas vs. Lewis, above cited, that the complainant had the right to retain for certain purposes, all of the agents or tenants, as parties, as the actual occupiers of the premises, still as is said in the same case by the learned Judge, that fact ought not to deprive the real defendant in the controversy of the right to have the same heard and determined by this Court.

It is alleged in the complaintant's bill that these alleged tenants are in possession of part of the premises but it does not appear from the allegations of the bill that they have any substantial right; on the contrary, by an express allegation in the bill it does appear that the complainant has no knowledge as to the rights, if any, which the said alleged tenants have in the premises and it may be legitimately presumed from the allegations in the bill that these alleged tenants are mere agents in

possession or, if they are tenants at all, they are tenants at will or by sufferance or at any rate that their tenancies are such that they will be determined before the suit is finally heard and that their rights in the premises, if any, are not such as to give them any interest whatever in the determination or decision of the controversy between the real parties to this litigation.

The allegation in the complainant's bill is that the complainant does not know what, if any, right or interest the said tenants have, except that the said complainant believes that they have no other interest save as tenants of the real defendant, Hetty H. R. Green. The petition for removal alleges specifically that the controversy is one which is wholly between the said complainant, John Evans Cornell, and the said defendant, Hetty H. R. Green, and there being no specific allegation in the bill to the contrary, the allegation in the petition for removal should be taken as true, especially as none of the alleged tenants appeared or answered, which fact may fairly, under the circumstances of the case, for the purpose of determining the question under consideration, be given the effect of a disclaimer.

It is therefore most respectfully submitted that under the authorities cited this case was properly removed to the Circuit Court.

III

MERITS OF THE CASE.

WILLIAM F. TUCKER WAS IN FACT PERSONALLY MADE A PARTY TO THE BILL IN THE FORECLOSURE PROCEEDINGS IN THE CASE OF GREEN VS. GAGE AND WAS DULY SERVED WITH PROCESS THEREIN SO THAT HE AND HIS HEIRS AND HIS ASSIGNS ARE BOUND BY THE DECREE IN THAT CASE, AND THEIR EQUITY OF REDEMPTION IS FOREVER BARRED BY THE FORECLOSURE AND SALE THEREIN.

It is submitted that in order to determine whether William F. Tucker was personally made a party to the foreclosure proceedings, and whether he was duly served with process, it is necessary to examine, first, the allegations of the bill relating to the said Tucker; second, the process which was issued; and third, the return or proof of service. This latter being important only for the purpose of ascertaining whether the process which was issued was served or not. The bill in the case of Green vs. Gage clearly, and unmistakeably, and unquestionably, makes William F. Tucker a party in three capacities, to-wit: First, personally; second, as one of the guardians of the minor children; and third, as one of the executors of the last will and testament of George W. Gage, deceased. In determining the sufficiency of the bill to make William F. Tucker a party to the proceedings in any of the foregoing capacities, the allegations of the bill should be separated into three parts, and those which apply to him in each capacity should be considered without regard to any of the allegations

which refer to him in any of the other capacities, and without reference to the allegations relating to any of the other parties. In determining whether this bill makes William F. Tucker a party in his individual capacity, and construing the bill in the manner above indicated, we find that the bill in Green vs. Gage, so far as it affects William F. Tucker personally, is as follows:

"Your oratrix, Hetty H. R. Green, who is a resident " of Bellows Falls, in the State of Vermont, and a citizen " of said last named State, brings this her bill of com- " plaint, against * * * William F. Tucker * " * * a resident of the county of Cook and State " of Illinois, and citizen of the said last named State" (then follows a list of other parties to the suit) "all of which " persons and corporations before named are made defend- " ants herein." (Then follows a statement of the cause of action and the default and the allegation that George W. Gage died on the 24th day of September, 1875,) "having " before that time, as appears by the record in the said " Recorder's office, by deed executed by himself, dated " December 18th, 1874; and recorded in the Recorder's " office December 19th, 1874, for consideration, as ex- " pressed in said deed, of $24,000, conveyed to the said " Tucker, all of said premises herein described, subject " to said incumbrances.

"Your oratrix further shows that said above named " parties against whom this bill of complaint is brought " have or claim to have some interest in said premises " described in said trust deed by mortgage, judgment, " conveyance, or otherwise; but your oratrix states those

" interests, whatever they are, are subject to the rights " of your oratrix under her securities before mentioned " and can not be set up against the same or in any way in- " terfere therewith." Then follows prayer for relief and prayer for process against " Sarah H. Gage and all other " defendants hereinbefore named."

The foregoing are the allegations of the bill wherein they state the case against William F. Tucker, personally, and there can certainly be no question but that the bill was not only sufficient to make him a party, but it was absolutely complete for that purpose. The allegations of the bill so far as it states the cause of action against the said William F. Tucker as one of the guardians of the minor children could be arranged together in the same manner, and will also be found sufficient and complete, as will also the allegations in the bill against the said William F. Tucker as one of the executors of the last will and testament of George W. Gage. It is difficult to conceive upon what ground the appellant can contend that William F. Tucker is not made a party to this bill personally. The bill certainly describes William F. Tucker, Joseph K. Barry and John W. Clapp, as individuals, and alleges the residence and citizenship of the individuals, and the bill is brought against the said individuals as residents and citizens of the county of Cook, State of Illinois, and it is specifically prayed that each of the individuals named shall be made defendants to the bill. It is impossible to conceive how the pleader could have used language which was more specific and unmistakable. If the foregoing language does not make Will-

iam F. Tucker, as an individual and resident of the county of Cook, State of Illinois, and a citizen of the last named State, a party defendant to the bill, there are no words which could be used that would have that effect. William F. Tucker is described in the bill as an individual or person who is a resident and citizen of the county of Cook, State of Illinois, and the fact that he is also described as one of the guardians of the minor children, and one of the executors of the last will and testament of George W. Gage, does not in any degree detract from the force of the allegation in the bill wherein the said William F. Tucker is described and made a party defendant to the bill as an individual who is a resident and citizen of the county of Cook, State of Illinois. The bill does not say:

That William F. Tucker, Joseph K. Barry and John W. Clapp, all of whom are residents of the county of Cook and State of Illinois, and citizens of the last named State, are made parties hereto as the guardians of the minor children, and the said Wm. F. Tucker is made a party hereto as executor, etc. If such had been the allegations of the bill and the question had been brought to the attention of the Court in the trial of the case, there might have been some room for criticising the bill, so far as it pretended to make William F. Tucker a party in his individual capacity. If, however, with the allegations of the bill as they actually are found in the record, they are tested by a technical, critical and captious construction being placed upon the same, there would be no possibility of holding that William F. Tucker was not made a party personally, but it might possibly be held

that all of the allegations relating to the said William F. Tucker were simply descriptive for the purpose of identifying him. In other words, the technical critic might say that William F. Tucker is made a party to the bill and that, in order to identify him as the William F. Tucker who is intended, he is described as a resident of the county of Cook and State of Illinois, and a citizen of the said State of Illinois, and for more specific and particular description, it is alleged that it is the same William F. Tucker who is one of the guardians of the minor children of George W. Gage, and the same William F. Tucker who is an executor of the last will and testament of George W. Gage, deceased. It would be difficult to find the Court that would subject the allegations in the bill to the above criticism, but it is suggested because the appellant herein is contending for a strict and technical construction and we have endeavored to show that if such a construction is given to the allegations of the bill it would have the effect of emphasizing the fact that the identical William F. Tucker who was a resident and citizen of the county of Cook and State of Illinois, and who was a guardian of the minor children of George W. Gage, and who was an executor of the last will and testament of George W. Gage, was made a party defendant to the bill. The contention of the appellant in this record seems to be that notwithstanding the fact that William F. Tucker is described as a person who is a resident and citizen of the county of Cook and State of Illinois, still inasmuch as he is also described as a guardian

of the minor children and executor of the last will and testament of George W. Gage, he is therefore released as a party individually to the proceedings. The position is certainly untenable. It is evident from the unmistakeable language of the bill, that Tucker is made a party defendant, and it is absolutely of no consequence that he is also described as a guardian and executor. The only effect of such descriptions taken in connection with the other allegations of the bill would be, not only to bind him personally, but also to bind him in the capacities named. In making William F. Tucker a party to the bill so as to bind his individual interest the pleader was not content with the allegations above referred to, which would have been amply sufficient for the purpose, but he alleges the specific interest which he is informed that William F. Tucker claims by alleging that George W. Gage had conveyed the property to him by a deed, the date of which is given and which is otherwise particularly described, and it is further specifically alleged that "the " above named parties against whom this bill of com- " plaint is brought, have or claim to have some interest " in said premises described in said trust deed by mort- " gage, judgment, conveyance or otherwise," etc. Upon this question the learned Judge who tried the case below found that "there can be no doubt that Tucker was be- " fore the Court in his representative capacities, and that " the bill also contains sufficient averments to put him " upon answer as to his individual interests in the sub-

"ject matter of the controversy." It is respectfully submitted that the soundness of this finding of the Court below can not be successfully challenged.

We have submitted the foregoing suggestions touching the sufficiency of the allegations of the bill to make William F. Tucker a party and it is now proper to determine what, if any, process was served upon him to bring him into Court.

It is respectfully submitted that if the subpœna which was issued in this case is subject to any criticism whatever, it is subject only to the criticism as to its sufficiency to summons William F. Tucker as guardian.

The subpœna is addressed to a number of persons and among them are, "William F. Tucker, Joseph K. Barry, "John W. Clapp, guardian," etc., and "William F. Tucker "executor," etc., and "Lewis L. Coburn, executor," etc. If the subpœna alone is looked to, John W. Clapp is the only person who is summoned as guardian, and William F. Tucker is summoned as executor and Lewis L. Coburn as executor. It therefore appears upon the face of the subpœna that whenever it was intended to summon a party in a representative capacity that the particular capacity is stated immediately after the name of the party. It is certainly very plain that the word *guardian*, following the name of John W. Clapp, refers to John W. Clapp, that is, if we propose to apply to this subpœna the strict, critical and technical construction for which the appellant is contending. It would be impossible for Tucker to learn from the face of the subpœna that he was made party as guardian, he

could have only ascertained that fact by coming into Court, and examining the bill and he would then have learned that he was made a party in person and as guardian and executor and he would be bound by the decree accordingly. It is very manifest that William F. Tucker is thereby summoned as an individual to exactly the same extent and in exactly the same manner as are all of the balance of the individual defendants. It is true that there is an expressed statement on the face of the subpœna that William F. Tucker is summoned as executor, but there is no express statement that he is summoned as guardian, although in view of the allegations of the bill that would be the effect of the subpœna, as was held by the learned Judge at the trial of the case.

The foregoing suggestions are submitted as to the language, meaning and effect of the subpœna which was issued and we now come to the consideration of the question as to the service.

We beg to suggest in this connection that the officer's return shows that he had executed the subpœna by "per-" sonally delivering a true and correct copy thereof to " each of the following named defendants on the day " stated opposite their names." The return then contains a long list of names and dates, showing the dates upon which each of the defendants was personally served with a copy of the subpœna. It is true that the officer says that on December 8, 1875, he personally delivered a true and correct copy of the subpœna to William F. Tucker as guardian and to William F. Tucker as executor. It is respectfully suggested that the entire litiga-

tion seems to have no other foundation to rest upon than the fact that in making this return the officer stated that he served a copy of this subpœna upon William F. Tucker as guardian and upon William F. Tucker as executor. It seems to have been assumed that this statement made by the officer has some legal significance, but it has, in fact, none whatsoever. In the consideration of this matter the Court will strike out of the officer's return the words "as guardian" and "as executor", as useless and meaningless surplusage. The officer's return is complete and absolutely conclusive proof of the fact that on December 8, 1875, William F. Tucker was duly and personally served with a true and correct copy of the subpœna, and so far as the issues in this case are concerned it is valuable for nothing else. The officer, the Marshal of the district, has assuredly no right to indicate the capacity in which William F. Tucker was served. It was his duty simply to make a return showing what he had done in the discharge of his duty, and his return is ample for that purpose and shows that he personally delivered a copy of the subpœna to William F. Tucker, and with the legal consequence of that act the Marshal has no concern. The return of the officer then, so far as it affects the issue in this case, is in effect as follows: *I have served the annexed writ by personally delivering a true and correct copy thereof to William F. Tucker, on the 8th day of December, 1875.* When the officer makes his return in January he states that he delivered a copy to Tucker as executor and as guardian, but this statement is absolutely, not only *functus officio*,

but it must be remembered that this statement was not found on the copy of the writ which was served upon William F. Tucker. William F. Tucker was served by the Marshal with a true and correct copy of the writ of subpœna, which did not have indorsed thereon the return of the officer. It is respectfully submitted that if the surplusage contained in the officer's return be stricken out there is absolutely nothing in this record upon which to base the statement, or proposition, or assumption, that William F. Tucker was only cited to appear in his representative capacity. The bill makes him a party as an individual and personally, the subpœna commands him personally to appear, and a copy of that subpœna is personally served upon him.

It must be manifest that the pretended objections to the manner in which the said William F. Tucker was personally made a party to the proceedings, and the manner in which he was served with process are extremely technical and would be, if the facts upon which they purport to be based really existed, at best but irregularities.

In the case of Johnson vs. Waters, 111 U. S., 672-673, the Court says:

" Some technical points have made in the case which " we have examined and think untenable. One is that " after the decease of Oliver T. Morgan, Matthew F. " Johnson was substituted in his place in the suit as da- " tive executor of the said Oliver T. Morgan, and not " as dative executor of Oliver J. Morgan. He was in

" fact both, and the bill of revivor, as amended, dis-
" tinctly states that subsequent to the filing of his plea,
" answer and demurrer, by Oliver T. Morgan, testamen-
" tary executor of Oliver J. Morgan, in the year 1873,
" the said Oliver T. Morgan died; and that subsequent to
" his death, Matthew F. Johnson had been appointed da-
" tive testamentary executor of the last will of said
" Oliver J. Morgan; and that assets of said Oliver J.
" Morgan had come into said Johnson's hands in that
" capacity, and prays that he may answer and set forth
" whether any and what assets of said estate of Oliver
" J. Morgan had come into his hands, and for an ac-
" count, etc. Upon this bill a subpœna was issued com-
" manding the Marshal to summon Matthew F. Johnson,
" dative testamentary executor of Oliver T. Morgan, to
" appear and answer the bill of revivor. Matthew F.
" Johnson did appear, entering his appearance as 'dative
" testamentary executor of Oliver T. Morgan' to the bill
" of revivor and to the amendments thereof, 'wherein
" Stephen Waters, administrator of the succession of
" Wm. Gay, deceased, is complainant, and said Matthew
" F. Johnson and others are defendants.' This appear-
" ance was entitled in the cause by its true title and num-
" ber. *The subpœna was mere process to bring the defendant*
" *into Court. When he came into Court and read the bill of*
" *revivor, he was informed that he was called upon to an-*
" *swer as dative executor of Oliver J. Morgan. This was*
" *sufficient.*"

In Hill vs. Gordon, 45 Fed. Rep., 278, the Court says: "It is contended by the complainants that the Court had "no jurisdiction of the person of the defendant, John T. "Matthews, because the return upon the original writ "was made in the name of a Special Deputy United "States Marshal, and not in the name of the Marshal. "There was personal service upon the defendant, and "the making of the return in the name of the deputy "was, at the most, only an irregularity."

In the case of Creveling vs. Moore, 39 Mich., 563, Judge Thomas M. Cooley in delivering the opinion of the Court, says: "Decree in this case was entered May 26, "1877, after order *pro confesso* on personal service of pro- "cess. On the first day of May, 1878, the defendants "filed a petition that the decree and order *pro confesso* be "set aside on the following grounds:

"1. That the subpœna issued and served upon them "was signed by the Deputy Register in his own name, "and not in the name of his principal.

"2. That by the subpœna the defendants were called "in to answer to the bill of complaint of 'Nelson Crev- "eling, of Minnie J. Boudman,' whereas the decree is "in favor of Nelson Creveling, *guardian* of Minnie J. "Boudman.

"3. That the copy of subpœna served upon them was "not subscribed by the complainant or his solicitor, or "by the officer serving the same, as required by the "rules of Court.

"The prayer of this petition was denied. This was "correct. The defects were mere irregularities, and if "the defendants desired to take advantage of them they "should have moved promptly. After the lapse of time "appearing in this case, such objections are not to be "listened to."

It appears that the learned Judge in the Court below also assumed that Tucker was summoned only as executor and guardian, but we submit as we have hereinbefore suggested, that the record does not bear out the assumption, unless the officer's return could control the legal effect of the delivery to Tucker of a copy of the subpœna which was issued in that case. The Court below, however, ruled that even though it were true that Tucker was only summoned as executor and guardian, that still he was charged with notice of the entire contents and subject of the bill. The Court below in its opinion on this question says:

"In Brasher vs. Van Courtland, 2 Johnson's Ch. Rep., "242, the bill was against a committee of a lunatic, the "subpœna was issued by the Clerk of the Court, but he "omitted the addition of the plaintiffs as executors and "of the defendants as a committee, believing those ad-"ditions unnecessary in the process.

"A default was taken against the defendants as com-"mittee and a decree entered against them as such.

" Upon an application to set aside the default and de-
" cree upon the ground that they were not served as a
" committee, the Court held that the defendants were
" too late for this objection, and that the process was
" sufficiently applicable to that bill.

" And in Executor of Walton vs. Herbert, 3 Green's
" Ch. Rep. (N. J.), 73, the bill was filed against James
" Herbert, surviving executor of James Herbert, de-
" ceased. The prayer was for process against said James
" Herbert.

" The subpœna issued against James Herbert gener-
" ally, without stating his official character or stating
" the character in which he was sued. On a demurrer
" to the bill the Court said :

" It is by inspecting the bill that the defendant ascer-
" tains the nature of the charge against him. The sub-
" pœna only gives him notice that there is a bill filed
" against him, and if he be properly charged in the bill as
" executor or devisee or in any other capacity, it is not a
" good objection that the subpœna is issued against him
" generally.

" Upon the principle asserted in this case, it seems
" quite clear to me that Tucker, having been served
" with process in his representative capacity,
" was chargeable with notice of the entire contents
" of the bill, so far as it affected him in his representa-
" tive or his individual capacity, and that it does not lie
" in his mouth to say that he was not properly before
" the Court. When Mr. Tucker was summoned into
" Court as executor and guardian, he was chargeable

" with notice of the entire contents and scope of the " bill, both as it affected his representative and his in- " dividual capacity. He certainly must be conclusively " presumed to have known that a bill was pending to fore- " close those two deeds upon the property, which he had " acquired by the deed from Gage in December, 1874, " and that he himself individually acquired title to these " lands by a deed from Gage subsequent to the making " of those trust deeds.

" I am, therefore, clear that Tucker was sufficiently " made a party before the Court to bind him in his in- " dividual as well as his representative capacity.

" The record entry of the default also recites that all " the parties defaulting, among whom were Tucker, had " been duly served with process, and as there was ample " time between the issue and return of the summons " served on Tucker in his representative capacity and the " time default was taken, at the April term, 1876, for " the issue of an alias or pleuries summons and service " upon Tucker individually, the Court will, I think, pre- " sume that such service was obtained as is recited in " the order of the Court.

" Robinson vs. Fair, 128, U. S., 86.

" Sargent vs. State Bank of Indiana, 12 How., 371.

" Mulvey vs. Gibbons, 87 Ill., 367."

SECOND—IF THE BILL, PROCESS, AND RETURN OF SERVICE, IN THE CASE OF GREEN vs. GAGE IS CAPABLE OF TWO CONSTRUCTIONS, THIS COURT WILL, BY REASON OF THE LAPSE OF TIME, THE EVIDENT INCREASE OF THE VALUE OF THE PROPERTY, THE INTERVENING DEATH OF TUCKER, AND ALL OF THE FACTS AND CIRCUMSTANCES SHOWN BY THE RECORD OF THIS CAUSE, ADOPT THE CONSTRUCTION WHICH WILL UPHOLD AND GIVE EFFECT TO THE DECREE, FORECLOSURE AND SALE IN THE SAID CASE OF GREEN vs. GAGE.

The case of Martin vs. Gray, 142 U. S., 236, was a case wherein a bill was filed to set aside a sale under foreclosure proceedings, on the ground that the owner of the equity of redemption had not been properly served with process and was, therefore, not bound by the judgment. It was contended by the complainant that there was defect in the return of the officer. In disposing of the case this Court says:

" Before considering the question of service, a prelim-
" inary matter is worthy of mention. This is an appli-
" cation to a court of equity, to set aside deliberate pro-
" ceedings of a court of superior jurisdiction; and is
" made more than eleven years after the matter com-
" plained of took place. There is no allegations that
" the subpœna was not in fact delivered to the plaintiff,
" or that he was ignorant of the proceedings in Court, or
" of the possession taken and held by defendant. While
" the bill alleges that the plaintiff was at the time of the
" filing a citizen of Kansas, it does not show how long
" he had been such. It is averred that the plaintiff's

" mother, sister, and brother, joint owners with himself " of the property, were made parties defendant to the " foreclosure proceedings; and it is not averred that they " were not duly served with process. It is shown that " the defendant entered into possession immediately af- " ter the sale, and has continued in possession, receiving " the rents and profits. From what is stated in the bill " as well as from what is omitted, it is a fair inference " that this plaintiff received the subpœna at the time the " original suit was commenced; that he was aware of " all the proceedings in the Court; that he knew of the " change in possession; and that he remained in Louis- " ville for years thereafter, with full knowledge that the " defendant had the possession, claimed it under the de- " cree, supposed he was owner, and received the rents " and profits as owner, and yet during all those years " made no complaint, and took no steps to assert any " rights as against the decree and sale.

" Now, it is a rule of equity, that an unreasonable de- " lay in asserting rights is a bar to relief. A familiar " quotation from Lord Camden, in Smith vs. Clay, 3 Bro. " Ch., 638, is that 'nothing can call forth this Court into " activity but conscience, good faith and reasonable dili- " gence.' Is not the delay disclosed by this bill such " laches as to defeat plaintiff's claim? For eleven years " he was inactive, and, as may be fairly inferred from " the bill, with the full knowledge of his rights, and " nothing to hinder their assertion. No excuses for this

"are given—the bill is absolutely silent as to any rea-
" sons for delay. But if this long delay will not of itself
" bar plaintiff's claim, it at least compels any reasonable
" construction of language which will sustain the de-
" cree."

THIRD—IF THE SAID IMPERFECTIONS AND IRREGULARITIES IN THE BILL AND PROCESS AND SERVICE THEREOF IN THE CASE OF GREEN VS. GAGE HAD, IN FACT, REALLY EXISTED AND THEIR EXISTENCE HAD CONFERRED UPON WILLIAM F. TUCKER, OR HIS HEIRS OR ASSIGNS, ANY RIGHT TO EQUITABLE RELIEF, SUCH AS IS SOUGHT IN THIS CASE, THEIR RIGHT HAS, UNDER THE CIRCUMSTANCES DISCLOSED BY THE RECORD, BEEN LOST BY THE LONG DELAY FOR WHICH, IN THE BILL, NO EXCUSE IS OFFERED.

The following is a chronological statement of the history of this case :

The mortgage to the Traveler's Insurance Company was executed on *July 22, 1871.*

The mortgage to Hetty H. R. Green was executed *May 7, 1873.*

Gage conveyed to Tucker *December 18, 1874.*

George W. Gage died on the *24th day of September, 1875.*

Hetty H. R. Green filed her bill for foreclosure of the two mortgages or deeds of trust *November 27, 1875.*

Sale was made to Hetty H. R. Green under the foreclosure proceedings *February 3, 1877.*

William F. Tucker died *September 13, 1887.*

The alleged heirs of William F. Tucker conveyed to the complainant, John Evans Cornell, in *January, February and March, 1890.*

John Evans Cornell filed his bill to redeem *April 4, 1890.*

It appears from the foregoing statement that the foreclosure proceedings instituted on November 27, 1875, were pending for more than a year and terminated on

February 3,1877, and that William F. Tucker lived for more than *ten* years after the foreclosure proceedings had been concluded and the deed to the appellee herein had been recorded, to-wit: Until the 13th of September, 1887. It appears that no pretense of right was ever asserted by said Tucker or his heirs until January, 1890, almost thirteen years after the foreclosure proceedings had been concluded and the deed to the appellee had been recorded. It is a significant fact that these alleged conveyances by the heirs of Tucker to the complainant herein were coincident with the inauguration of a movement, upon the part of the Government and of the people, to hold at Chicago the great Columbian Exposition, an event which was calculated, or was doubtless expected by the complainant, to greatly increase the value of property situated in and near the City of Chicago. The property had been held and owned under the foreclosure proceedings for more than 13 years by the appellee and being situated in the suburbs of a large and growing city it might reasonably be presumed to have greatly increased in value and there can be no question but at the time this bill was filed a great, sudden and unprecedented increase in value was likely to be realized by reason of the holding of the World's Fair at Chicago.

It is somewhat astonishing to note that in the complainant's bill in this case there is absolutely no pretense of an excuse offered for the long delay in prosecuting this cause. There is absolutely no pretense of a reason given why Tucker, who was intimately connected with all of the transactions with relation to this property, had

not, during the ten years that he lived after the foreclosure proceedings had concluded, ever asserted any right to the property or any claim against the same. It may reasonably be presumed that if Tucker was living he would be compelled to state that he was duly served with process in the case, knew positively that it was pending, that it had ripened into a decree of foreclosure and sale, and that he believed and understood that the foreclosure and sale barred whatever right or equity of redemption he might have had.

It may be reasonably presumed that if Tucker was living and would submit his conscience to be searched by a court of equity it would be readily ascertained that he had always understood and considered that the decree in the case of Green vs. Gage had full force and effect against any right, title or interest which he might have had in the property. This presumption will be more readily indulged in by this Court in view of the fact that notwithstanding Tucker lived for more than ten years after the foreclosure proceedings had been concluded, he asserted no right, title, interest or claim in and to this property, never made any conveyance of the same or any part thereof, and acted to all intents and purposes, so far as this record discloses and so far as the allegations in the complainant's bill show, as though he had no interest whatever in the property and as though he considered the foreclosure proceedings as conclusive as against him. It is also a significant fact that notwithstanding Tucker died on the 13th day of September, 1887, his heirs made no claim whatsoever to the property until two years and

a half after his death, and it is, to say the least, a very strange coincidence that the claim which was asserted was just at the time that the World's Fair was expected to be inaugurated and the property might reasonably be expected to greatly increase in value.

We again call the attention of the Court to the fact that in the bill there is absolutely no excuse or pretense of an excuse offered for the delay upon the part of Tucker or his heirs.

It appears, however, from the brief and argument upon the part of the appellant hereinbefore filed on the 17th day of April, 1893, that the appellant hopes to escape the consequences of this delay by contending that the doctrine of laches is not applicable where the mortgagee became the purchaser at the sale and by also contending that the mortgagor's right of redemption is not barred short of the period prescribed by the statutes of limitations and that in the State of Illinois the rule is that the mortgagor's right of redemption does not become barred until after the expiration of twenty years.

We respectfully submit that the contention of the appellant on this branch of the case is so forcibly negatived and the principles which govern all courts of equity and especially this Court, in such cases, in the exercise of its equity jurisdiction are so aptly, forcibly and conclusively stated in the adjudicated cases that in replying to the appellant's brief on this branch of the case we will content ourselves by using the exact language of the Courts.

The case of Abraham vs. Ordway, 158 U. S., 417, being one of the most recent adjudications of this Court, is a case wherein the mortgagee was the purchaser at the foreclosure sale and the death of some of the parties intervened, and in many other respects the facts of the case are almost identical with the case at bar. The opinion in this case defines the doctrine of laches as it is recognized by this Court and so conclusively settles many of the questions which are presented for determination under this branch of the case that we beg to offer as a part of this brief and argument the entire opinion of the Court in that case.

Mr. Justice Harlan delivered the opinion of the Court:

" On the 22d day of May, 1869, Benard Burnstine—
" his wife Elizabeth uniting with him in the deed—con-
" veyed to Levi Abraham certain real estate in the City
" of Washington in trust for the sole and separate use of
" the wife, with power in her at any time to dispose of
" the property in whole or in part, or to encumber it by
" deed or by will, or by other instrument in the nature
" of a last will and testament.

" The deed provided that the trustee should permit the
" wife, her executors, administrators, and assigns, to
" have, hold, use, possess and enjoy the trust property;
" to receive its rents, issues and profits as if she were a
" femme sole; and if she disposed of it the trustee was
" not to be responsible therefor, nor for the application
" of its proceeds.

" The deed upon its face recites that it was made pur-
" suant to a mutual agreement between the grantors to
" live separately and apart from each other during their
" lives.

" Subsequently, on the 10th of May, 1870, Mrs.
" Burnstine obtained a divorce, and shortly thereafter,
" June 24th. 1870, married one Solomon Caro.

" On the 24th of September, 1870, Mrs. Caro executed
" to Harriet Ordway a promissory note for $3000, paya-
" ble in two years from that date with interest at 10 per
" cent. To secure its payment, Levi Abraham, the trus-
" tee in the Burnstine deed—Mrs. Caro uniting with
" him—executed to John E. Norris, trustee, a deed cov-
" ering the above real estate. This deed recited that
" the note was given to secure the just indebtedness of
" Mrs. Caro to Harriet Ordway. But the bill alleges
" and the demurrer admits that it was, in fact, given for
" money borrowed from the payee by Solomon Caro.
" This last deed was in trust that Mrs. Caro, her heirs
" and assigns, should have, hold, use and enjoy the
" premises, and their rents, issues, and profits to take,
" receive, and apply to their own use until some default
" or failure occurred in the payment of the debt or some
" part of the debt due to Mrs. Ordway. It also pro-
" vided that upon the written request of the latter, as
" the legal holder of the above note, the trustee should
" proceed to sell and dispose of the premises, or so much
" thereof as might be deemed necessary, at public sale

" to the highest bidder, upon such terms and conditions " as the trustee deemed best for the interest of all parties " concerned, giving due notice of sale.

"On the 21st of December, 1874, Elizabeth Caro joined " with Levi Abraham in a deed conveying the real estate " in question to Esther Rebecca Abraham in fee.

"Caro having abandoned his wife, she obtained from " the Supreme Court of the District of Columbia, on the " 20th of October, 1876, a decree of divorce and a resto- " ration of her maiden name of Elizabeth Abraham. The " latter paid interest on the above note for about eight " years. But having ceased to make such payments, the " property was sold at public auction on the 6th of Jan- " uary, 1879, pursuant to the terms of the Norris deed of " trust; and on the same day Norris executed to Mrs. " Ordway, the purchaser, a deed conveying to her the " property in fee. After this purchase, Mrs. Ordway " took possession of the property, and received the rents " and profits thereof.

"Elizabeth Rebecca Abraham, the grantee in the deed " of December 21, 1874, died August 10, 1886, intestate, " leaving the appellants as her only heirs at law.

"Levi Abraham, the trustee, died on the 28th of April, " 1876. Norris died on the 4th day of February. 1887.

"The appellants brought this suit upon the theory that " the above note having been executed by Elizabeth " Abraham while she was a married woman, the wife of " Caro, was void; that the deed of trust to Norris was, " for that reason, of no effect as security for its payment;

" and that the conveyance by Norris to Mrs. Ordway " created a resulting trust for the benefit of the plaintiffs.

"The prayer of the bill was for a decree requiring the " defendant Harriet Ordway to convey all her right, title, " and interest in the estate in question to the plaintiffs, " and account to them for rents and profits.

" The defendants demurred upon the ground that the " plaintiff did not by their bill present a case entitling " them to relief in a court of equity. The demurrer " was sustained and the bill dismissed. That decree " was affirmed in the general term.

" After the decree below was perfected, the defendant, " Harriet Ordway, died, and the present appellees are " her devisees.

" Counsel express gratification that an opportunity " is presented in this case for the construction of what " is known as the Married Woman's Act of April 10, " 1869, in force in the District of Columbia, particularly " the section providing that 'any married woman may " contract and sue, and be sued in her own name, in all " matters having relation to her sole and seperate prop- " erty, in the same manner as if she were unmarried." " Rev. Stat. Dist. Col., 729.

" We do not deem it necessary at this time to consider " the scope of that act, nor to determine whether it was " correctly interpreted in Schneider vs. Garland, 1 " Mackey, 350. The case can be disposed of upon a " ground that does not involve the construction of that " statute, and which cannot be ignored, whatever con- " clusion might be reached as to the power of Elizabeth

" Abraham, while she was the wife of Solomon Caro, to
" charge the estate in question with the payment of the
" $3000 note. That ground is, that the plaintiffs and
" those under whom they assert title have been guilty of
" such laches as to have lost all right to invoke the aid
" of a court of equity. Nearly nineteen years elapsed
" after the execution of the deed to Norris before the
" present suit was brought. And although the plaintiff
" Elizabeth was the wife of Caro when that deed was
" made, she was divorced in 1876, nearly thirteen years
" before the institution of these proceedings. She paid
" interest on the debt of $3000 for about eight years,
" without, so far as the bill discloses, protesting that
" she was not legally bound to do so. Some of those
" payments must have been made after her divorce
" from Caro, and while she was an unmarried woman.
" She did not pretend to have been ignorant of the public
" sale, under the Norris deed, at which Mrs. Ordway
" purchased the property at the price of twenty-seven
" hundred and fifty dollars. Nor did she pretend to have
" been unaware, at the time, of the fact that Mrs. Ord-
" way, after her purchase, went into possession and con-
" tinuously received the rents and profits of the estate.

" It appears also on the face of the bill that in 1874
" Levi Abraham and the plaintiff Elizabeth, then Eliza-
" beth Caro, conveyed this property to Esther Rebecca
" Abraham. Whether this deed was recorded or not the
" bill does not state. But the grantee in that deed did not
" die until August 10, 1886, nearly twelve years after
" the conveyance to her, nearly seventeen years after the

" date of the deed to Norris, and more than seven years
" after the sale and conveyance to Mrs. Ordway under
" that deed. It does not appear that Esther Rebecca
" Abraham in her life time ever disputed the title ac-
" quired by Mrs. Ordway under the sale made by Norris,
" trustee. No explanation is given in the bill of her
" failure to bring suit.

" The property in dispute, it may well be assumed,
" has greatly appreciated in value since Mrs. Ordway's
" purchase, which was more than ten years prior to this
" suit. It is now too late to ask assistance from a court
" of equity. The relief sought cannot be given con-
" sistently with the principles of justice, or without en-
" couraging such delay in the assertion of rights as ought
" not to be tolerated by courts of equity. Whether
" equity will interfere in cases of this character must de-
" pend upon the special circumstances in each case.
" Sometimes the Courts act in obedience to statutes of
" limitations; sometimes in analogy to them. But it is
" now well settled that independently of any limitation
" prescribed for the guidance of courts of law, equity
" may, in the exercise of its own inherent powers, refuse
" relief where it is sought after undue and unexplained
" delay, and when injustice would be done, in the par-
" ticular case, by granting the relief asked. It will, in
" such cases, decline to extricate the plaintiff from the
" position in which he has inexcusably placed himself,
" and leave him to such remedies as he may have in a
" court of law. Wagner vs. Baird, 7 How., 234, 238;
" Harwood vs. Railroad Co., 17 Wall., 78, 81; Sullivan

" vs. Portland, etc., Railroad, 94 U. S., 806, 811; Brown
" vs. County of Buena Vista, 94 U. S., 157, 159; Haywood
" vs. National Bank, 96 U. S., 611, 617; Lansdale vs.
" Smith, 106 U. S., 391,392; Speidel vs. Henrici, 120
" U. S., 377, 387; Richards vs. Mackall, 124 U. S., 183,
" 188.

" The present suit is peculiarly one for the application
" of this principle. The contention of the appellants is
" that under the Married Woman's Act of 1869 the lands
" in question became, after the divorce of the plaintiff
" Elizabeth from Burnstine, her legal and statutory, as
" distinguished from her eqitable, separate estate, and
" that the deed to Norris which secured the $3000 note
" was absolutely void, because that note was not given
" by Mrs. Caro in respect of any matter 'having relation
" to her sole and separate property.' Rev. Stat. Dist.
" Col., 729. It is conceded that if that note, in fact,
" and within the meaning of that act, had 'relation' to
" the estate here in dispute, then the Norris deed was
" valid as security for the debt evidenced by the note.
" But whether the debt was of that character depended—
" unless the recitals in the Norris deed on that point are
" not in themselves conclusive—upon such proof, in re-
" spect to the origin of the debt and its relation to the
" estate conveyed by that deed, as could be made, after
" nearly twenty years had elapsed from the date of the
" deed, and after the death both of Levi Abraham, the
" grantor, and of Norris, the grantee. One of the
" grounds upon which courts of equity refuse relief
" where the plaintiff is guilty of laches is the injustice

" of imposing upon the defendant the necessity of making
" proof of transactions long past, in order to protect
" himself in the enjoyment of rights which, during a
" considerable period, have passed unchallenged by his
" adversary, with full knowledge of all the circumstan-
" ces. The principle has been thus stated by this Court:
" 'Length of time necessarily obscures all human evi-
" dence, and deprives parties of the means of ascertain-
" ing the nature of original transactions; it operates by
" way of presumption in favor of the party in possession.
" Long acquiesence and laches by parties out of pos-
" session are productive of much hardship and injustice
" to others, and cannot be excused but by showing some
" actual hindrance or impediment caused by the fraud
" or concealment of the party in possession, which will
" appeal to the conscience of the Chancellor. Wagner
" vs. Baird, 7 How., 258.'

" The appellants insist that, as this suit relates to land,
" the doctrine of laches, as announced in the above
" cases, has no application. There is no foundation in
" the above cases for this suggestion. It is true, as
" stated by counsel, that in Wagner vs. Baird, just cited,
" the Court says that in many cases courts of equity 'act
" upon the analogy of the limitations at law; as where a
" legal title would in ejectment be barred by twenty
" years' adverse possession, 'and will act upon the like
" limitation, and apply it to all cases of relief sought
" upon equitable titles, or claims touching real estate.'
" But it proceeds to say: 'But there is a defense pecu-
" liar to courts of equity, founded on lapse of time and

" the staleness of the claim, where no statute of limita-
" tions distinctly governs the case. In such cases courts
" of equity often act upon their own inherit doctrine of
" discouraging, for the peace of society, antiquated de-
" mands, by refusing to interfere where there has been
" gross laches in prosecuting rights, or long acquies-
" cence in the assertion of adverse rights. 2 Story Eq.,
" 1520. A court of equity will not give relief against
" conscience or where a party has slept upon his rights.'

" Allore vs. Jewell, 92 U. S., 506, is also cited by ap-
" pellants. This was a suit to cancel a conveyance of
" land upon the ground that the grantor was incapable
" from mental weakness of comprehending the nature of
" the transaction. Six years elapsed before suit, and it
" was objected that the suit could not for that reason be
" maintained. The Court said that there was no statu-
" tory bar in the case, and the relief asked was granted
" because, under the peculiar circumstances of that case,
" application for relief must be held to have been season-
" ably made, and because the facts justified the cancella-
" tion of the deed.

" Counsel rely with some confidence upon the follow-
" ing observations in Wehrman vs. Conklin, 155 U. S.,
" 314, 326: 'If the plaintiff at law has brought his action
" within the period fixed by the statute of limitations, no
" Court can deprive him of his right to proceed. If the
" statute limits him to twenty years, and he brings his
" action after the lapse of nineteen years and eleven
" months, he is as much entitled as matter of law to
" maintain it as though he had brought it the day after

"his cause of action accrued.' That this Court did not "intend to lay down any such rule as the appellants "contend for, is quite evident from the following sen- "tences, not quoted by them, but which immediately "precede those above quoted: 'It is scarcely necessary "to say that complainants (in the equity suit) cannot "avail themselves as a matter of law of the laches of "the plaintiff in the ejectment suit. Though a good de- "fense in equity, laches is no defense at law.'

"The claim of the appellants is without merit and the "decree is *affirmed*."

The next case to which we will cite the Court is the case of Connely vs. Rue, 148 Ill., 207, being a recent adjudication of the Supreme Court of the State of Illinois which denies the soundness of the proposition which is submitted on the question of laches on behalf of the appellant.

The case of Connely vs. Rue, 148 Illinois, 207, was a bill to redeem after sale and foreclosure proceedings, upon the ground, among other things, of defective service, and in this case the Supreme Court of Illinois, speaking through Phillips, J., said:

"No fraud is shown in any of the proceedings for fore- "closure, and the evidence shows that Connely lived in "Chicago, but a short distance from the land. For more "than three years before filing this bill, he was con- "versant with the fact of the foreclosure, as appears from "his letter to Rue. It was his duty to act with reason- "able promptness if he desired to avoid a sale of the

" land. He can not remain silent and inactive, awaiting
" a rise in value, and then come forward, and ask to set
" aside a sale, and seek to redeem, that he may speculate
" on that rise of value. In Williams vs. Rhodes, 81 Ill.,
" 571, it was held: 'But the period of limitation in such
" actions, or, indeed, in any other class of actions, is not
" necessarily to control. Numerous cases have been de-
" cided by this Court where delay for a much less period
" than that fixed by the statute of limitations has been
" held to preclude the right of the party to bring the suit.
" In such cases it is said courts of equity act upon their
" own inherent doctrine of discouraging, for the peace of
" society, the prosecution of the suit; and no general
" rule can be laid down for the guide of the court in ev-
" ery case.' A delay which might have been of no con-
" sequence in an ordinary case may be amply sufficient
" to bar the title of relief where the property is of a spec-
" ulative character, or is subject to contingencies, or
" where the rights or liabilities of others have in the
" meantime been varied. If the property is of a spec-
" ulative or precarious nature, it is the duty of the party
" complaining of the fraud to put forward his complaint
" at the earliest possible time. He can not be allowed
" to remain passive, prepared to affirm the transaction
" if the concern should prosper, or to repudiate it if that
" should prove to his advantage.' Kerr, Fraud and M.
" (Bump's Ed.) pp. 306, 307.) To the same effect are
" Hoyt vs. Institution, 110 Ill., 390; Hamilton vs. Lu-
" bukee, 51 Ill., 415; Bush vs. Sherman, 80 Ill., 160;
" McHany vs. Schenk, 88 Ill., 357; Speck vs. Car Co.,

"121 Ill., 33, 12 N. E., 213. We hold that the com-
"plainant was guilty of such laches that he is not en-
"titled to the relief prayed, even if the sale was void-
"able." (35 N. E., 845.)

In the case of Brown vs. Frost, 10 Paige's Chan., 242, Chancellor Walworth says: "The ordinary form of "decrees of foreclosure in this Court gives to the mort-"gagee, or any other party to the suit, the same right "which a stranger has to become a purchaser at the "Master's sale. And if the mortgagee bids more for "the property than it is worth, he is still bound to take "it in satisfaction of his debt to the extent of his bid, "and to pay the surplus money, if any, to the owner of "the equity of redemption. Where the property is fairly "struck off to him, therefore, he has the same right to "be protected in his purchase, if he complies with the "terms and conditions of the sale, as though he were "not a party to the decree of foreclosure."

The decree in the case of Green vs. Gage specifically authorizes the complainant or any party to the case to become the purchaser. (Tr., 81.)

In the case of Foster vs. Mansfield, Coldwater & Lake Michigan Railroad Company, 146 U. S., 88, it was decided that, "If a bill to set aside a foreclosure sale of a "railroad under a mortgage, on the ground of fraud and "collusion, be not filed until ten years after the sale, a "presumption of laches arises which it is incumbent on "the plaintiff to rebut.

"The interpretation we give to the statute is sup-
"ported by the principle upon which courts of equity
"uniformly proceed, independently of any statute of
"limitations, of refusing relief to those who unreason-
"ably delay to invoke their aid."

(Parker vs. Dachres, 130 U. S., 43.)

In the case of Richards vs. Mackall, 124 U. S., 187, the Court says:

"Is appellee entitled to relief in a court of equity in
"respect to the sale of June 13, 1870? In Badger vs.
"Badger, 2 Wall., 87, 95, it was said that a party who
"makes an appeal to the conscience of the Chancellor
"should 'set forth in his bill specifically what were the
"impediments to an earlier prosecution of his claim;
"how he came to be so long ignorant of his rights, and
"the means used by the respondent to fraudulently keep
"him in ignorance; and how and when he first came to
"a knowledge of the matters alleged in his bill; other-
"wise the Chancellor may justly refuse to consider his
"case, on his own showing, without enquiring whether
"there is a demurrer or formal plea of the statute of
"limitations in his answer.' So in Sullivan vs. Port-
"land, etc., Railroad Co., 94 U. S., 806, 811: 'To let in
"the defense that the claim is stale, and that the bill
"cannot, therefore, be supported, it is not necessary
"that a foundation be laid by any averment in the
"answer of defendants. If the case, as it appears at the
"hearing, is liable to the objection by reason of the laches
"of the complainants, the Court will, upon that ground,
"be passive and refuse relief.' In the latter case, it was

" said that equity would sometimes refuse relief where a " shorter term than that prescribed by the statute had " elapsed without suit. See also Hume vs. Beal, 17 " Wall., 336; Marsh vs. Whitmore, 21 Wall., 178, 184 " 185; Hayward vs. National Bank, 96 U. S., 611, 617; " Speidel vs. Henrici, 120 U. S., 377, 387."

In Sullivan vs. Portland, etc., R. R. Co., 94 U. S. 811, the Court says :

" To let in the defense that the claim is stale, and that " the bill cannot therefore, be supported, it is not neces- " sary that a foundation shall be laid by any averment " in the answer of the defendants. If the case, as it " appears at the hearing, is liable to the objection by " reason of the laches of the complainants, the Court " will, upon that ground, be passive, and refuse relief. " Every case is governed chiefly by its own circumstan- " ces; sometimes the analogy of the statute of limita- " tions is applied; sometimes a longer period than that " prescribed by the statute is required; in some cases a " shorter time is sufficient; and sometimes the rule is ap- " plied where there is no statutable bar. It is competent " for the Court to apply the inherent principles of its " own system of jurisprudence, and to decide accord- " ingly. Wilson vs. Anthony, 19 Barber (Ark.), 16; " Taylor vs. Adams, 14 Id., 62; Johnson vs. Johnson, 5 " Ala., 90; Ferson vs. Sanger, 2 Ware, 256; Fisher vs. " Boody, 1 Curtis, 219; Cholmondly vs. Clinton, 2 Jac. " & Walk., 141; 2 Story's Eq., Sec. 1520a.

"A court of equity, which is never active in giving "relief against conscience or public convenience, has "always refused its aid to stale demands where a party "has slept upon his rights, and acquiesced for a great "length of time. Nothing can call forth this court into "activity but conscience, good faith, and reasonable "diligence. Where these are wanting, the Court is "passive, and does nothing. Laches and neglect are "always discountenanced; and, therefore, from the be- "ginning of this jurisdiction there was always a limita- "tion to suits in this Court. Smith vs. Clay, Ambler, "645."

In Godden vs. Kimmell, 99, U. S., 201, the Court says: "Stale claims are never favored in equity, and "where gross laches is shown and unexplained ac- "quiescence in the operation of an adverse right, courts "of equity frequently treat the lapse of time, even for a "shorter period than the one specified in the statute of "limitations, as a presumptive bar to the claim. Stearns "vs. Page, 7 How., 819; Badger vs. Badger, 2 Cliff., "154."

In McKnight vs. Taylor, 1 Howard, 551, the Court says: "But we do not found our judgment upon the "presumption of payment, for it is not merely on the "presumption of payment or in the analogy to the "statute of limitations that a court of chancery refuses to "lend its aid to stale demands. There must be consci- "ence, good faith, and reasonable diligence, to call into "action the powers of the Court. In matters of account,

" where they are not barred by the act of limitations,
" courts of equity refuse to interfere after a considerable
" lapse of time, from considerations of public policy, and
" from the difficulty of doing entire justice when the or-
" iginal transactions have become obscure by time, and
" the evidence may be lost. The rule upon this subject
" must be considered as settled by the decision of this
" Court in the case of Piatt vs. Vatier, 9 Peters, 416; and
" that nothing can call a court of chancery into activity
" but conscience, good faith, and reasonable diligence;
" and where these are wanting the Court is passive, and
" does nothing; and, therefore, from the beginning of
" equity jurisdiction, there was always a limitation of
" suit in that Court."

In the case of Twin-Lick Oil Co. vs. Marbury, 91 U. S., 591, the Court says: "The doctrine is well settled, " that the option to avoid such a sale must be exercised " within a *reasonable* time. This has never been held to " be any determined number of days or years as applied " to every case, like the statute of limitations, but must " be decided in each case upon all the elements of it " which affect that question. These are generally the " presence or absence of the parties at the place of the " transaction, their knowledge or ignorance of the sale, " and of the facts which render it voidable, the permanent " or fluctuating character of the subject-matter of the " transaction as affecting its value, and the actual rise or " fall of the property in value during the period within " which this option might have been exercised.

" In fixing this period in any particular case, we are " but little aided by the analogies of the statute of limi- " tation; while, though not falling exactly within the " rule as to time for rescinding or offering to rescind, a " contract by one of the parties to it for actual fraud, the " analogies are so strong as to give to this latter great " force in the consideration of the case. In this class of " cases the party is bound to act with reasonable dili- " gence as soon as the fraud is discovered, or his right to " rescind is gone. No delay for the purpose of enabling " the defrauded party to speculate upon the chances " which the future may give him of deciding profitably " to himself whether he will abide by his bargain, or " rescind it, is allowed in a court of equity."

In the case of Hayward vs. National Bank, 96 United States, 611, the Court says:

" Courts of equity often treat a lapse of time, less " than that prescribed by the statute of limitations, as a " presumptive bar on the ground of 'discouraging stale " claims, or gross laches, or unexplained acquiescence in " the assertion of an adverse right.' 2 Story Eq. Jur., " Sec. 1520. In Smith vs. Clay (Amb., 645), Lord " Camden said: 'A court of equity, which is never ac- " tive in relief against conscience or public convenience, " has always refused its aid to stale demands, when the " party has slept upon his rights, and acquiesced for a " great length of time. Nothing can call forth this " Court into activity but conscience, good faith and rea- " sonable diligence. When these are wanting the Court

" is passive and does nothing. Laches and neglect are " always discountenanced.' These doctrines have re- " ceived the approval of this Court in numerous cases. " Twin Lick Oil Co. vs. Marbury, 91 U. S., 587; Bad- " ger vs. Badger, 2 Wall.. 87; Marsh vs. Whitmore, 21 " Id., 178; Harwood vs. Railroad Company, 17 Id., 79. " In the last named case this Court said that, without " reference to any statute of limitation, equity has " adopted the principle that the delay which will defeat " a recovery must depend upon the particular circum- " stances of each case. The question of acquiescence or " delay may often be controlled by the nature of the " property which is the subject of litigation. 'A delay " which might have been of no consequence in an ordi- " nary case, may be amply sufficient to bar relief when " the property is of a speculative character, or is subject " to contingencies, or where the rights and liabilities of " others have been in the meantime varied. If the " property is of a speculative or precarious nature, it is " the duty of a man complaining of fraud to put forward " his complaint at the earliest possible time. He cannot " be allowed to remain passive, prepared to affirm the " transaction if the concern should prosper, or to repu- " diate it if that should prove to his advantage.' Kerr, " Mistake and Fraud (Bump's Ed.), 302, 306; Twin " Lick Oil Co. vs. Marbury, supra."

In the case of Speidel vs Henrici, 120 U. S., 387, the Court says :

" Independently of any statute of limitations, courts " of equity uniformly decline to assist a person who has

" slept upon his rights and shows no excuse for his " laches in asserting them. 'A court of equity,' said " Lord Camden, 'has always refused its aid to stale de- " mands, where the party slept upon his rights, and " acquiesced for a great length of time. Nothing can " call forth this court into activity but conscience, good " faith and reasonable diligence; where these are want- "'ing, the Court is passive, and does nothing. Laches " and neglect are always discountenanced, and there- " fore from the beginning of this jurisdiction, there " was always a limitation to suits in this Court.' " Smith vs. Clay, 3 Bro. Ch., 640, Note. This doctrine " has been repeatedly recognized and acted on here. " Piatt vs. Vattier, 9 Pet., 405; McKnight vs. Taylor, " 1 How., 161; Wagner vs. Baird, 7 How, 234; Badger " vs. Badger, 2 Wall., 87; Bowman vs. Wathen, 1 How., " 189; Hume vs. Beale, 17 Wall., 336; Marsh vs. Whit- " more, 21 Wall., 178; Sullivan vs. Portland & Kenne- " bec Railroad, 94 U. S., 906; Godden vs. Kimmel, 99 " U. S., 201. In Hume vs. Beale, the Court, in " dismissing, because of unexplained delay in sueing, a " bill by *cestuis que* trust against a trustee under a deed, " observed that it was not important to determine " whether he was the trustee of a mere dry legal estate " or whether his duties and responsibilities extended " further. 17 Wall., 348. See also Bright vs. Legerton, " 29 Beavan, 60, and 2 D., F. & J., 606.

" When the bill shows upon its face that the plaintiff, " by reason of lapse of time and of his own laches, is " not entitled to relief, the objection may be taken by

"demurrer. Maxwell vs. Kenedy, 8 How., 210; "National Bank vs. Carpenter, 101 U. S., 567; Lans- "dale vs. Smith, 106 U. S., 391."

In the case of Marsh vs. Whitmore, 21 Wall., 183, the Court says:

"At any rate the claim now presented is a stale "one. The complainant does not set forth specifically "any grounds which could have constituted impedi- "ments to an earlier prosecution of his suit. He does "not even inform us when he first became acquainted "with his supposed wrongs. His language is that he "was not aware of the purchase by the defendant *until* "*lately*,—language altogether too vague to invoke the "action of a court of equity. The party, says this "Court, in Badger vs. Badger, citing from previous de- "cisions, who appeals to the conscience of the Chancel- "lor in support of a claim, where there has been laches "in prosecuting it, or long acquiescence in the assertion "of adverse rights 'should set forth in his bill specific- "ally what were the impediments to an earlier prosecu- "tion of his claim; how he came to be so long ignorant "of his rights, and the means used by the respondent to "fraudulently keep him in ignorance; and how and when "he first came to a knowledge of the matters alleged in "his bill; otherwise the Chancellor may justly refuse to "consider his case, on his own showing, without inquir- "ing whether there is a demurrer or formal plea of the "statute of limitations contained in the answer.'"

In the case of Schlawig vs. Furslow, 59 Federal Reporter, 853, the Court says:

" The doctrine of laches, as heretofore applied, both " by this Court and other courts, also fully warranted the " decree dismissing the bill of complaint, even if we " should concede that there was no other adequate ground " for refusing relief. It is a fundamental rule that courts " of equity will not aid a suitor who has for a long time " acquiesed in the assertion of adverse rights without " any excuse for so doing; and especially is this true if " his conduct savors of bad faith, and the relief sought " will be productive of much hardship and injustice to " others. Godden vs. Kimmell, 99 U. S., 201; Badger " vs Badger, 2 Wall., 87; McKnight vs. Taylor, 1 How., " 161; Naddo vs. Bardon, 2 C. C. A., 335, 51 Fed., 493; " Lemoine vs. Dunklin Co., 2 C. C. A., 343, 51 Fed., " 487. Courts of equity will also refuse to interfere, " though the period of delay is comparatively short, " where the complainant, being out of possession of prop- " erty, has waited before bringing suit until the same " has greatly enhanced in value, or has stood by and suf- " fered the opposite party, without notice of his claim, to " expend his money in making valuable improvements " on the property to which the claim relates. Landrum " vs. Bank, 63 Mo., 78, 56, 57; Moreman vs. Talbott, " 55, Mo., 392; Kinny vs. Webb, 4 C. C. A., 170, 175, " 54, Fed., 34."

The Court below, on the subject that we are now considering, says: " It may also, I think, be urged with " great force that this bill should not be sustained on the

" ground of the laches of the complainant. Tucker ac-
" quired his title before the foreclosure proceedings. The
" foreclosure proceedings were completed on the 2nd of
" January, 1877. Tucker lived until September, 1887,
" nearly ten years, and there is no allegation or state-
" ment in the bill that his heirs-at-law were then labor-
" ing under any disability. This suit was not com-
" menced until April, 1890, so that there has been a pe-
" riod of over thirteen years since the commencement of
" the foreclosure proceedings and the vesting of the abso-
" lute title to this property in the complainant, and yet
" no attempt is made to explain this long delay or to
" give any reason why the complainant or those under
" whom the complainant claims have not instituted pro-
" ceedings at an earlier day, and it had been held by the
" Supreme Court of the United States that laches may
" be availed of as a defense on demurrer.

"Landsdale vs. Smith, 106 U. S., 391.

"Speidel vs. Henrice, 120 U. S., 377.

"Richards vs. Mackall, 124 U. S., 183.

"In the latter case a bill to set aside a Marshal's deed
" nearly twelve years after the sale was held to be too
" late and the laches was held sufficient on demurrer."

It is true that the Court also says: "I choose, however,
" to place my decision in the case upon the ground that
" Tucker was sufficiently before the Court in the fore-
" closure proceedings to be bound by the decree of sale
" there made, and that those claiming under him can
" not now complain that he was not specifically served
" with process in his individual capacity."

It was evidently the opinion of the learned Judge that having found that Tucker was a party to the suit, and bound by the decree, it was unnecessary to hold that the lapse of time since the decree was entered would deprive him or his heirs or assigns of a right which had not existed since the foreclosure proceedings were concluded, but it is also evident that if the Court below had not considered that the entire controversy was settled by its finding that Tucker was a party to the suit and bound by the decree and sale therein it would have sustained the demurrer, on the ground that whatever right he might have had by reason of any irregularity in the foreclosure proceedings had been lost by the unexplained delay.

There is another feature of this bill, which in this connection and under this branch of the case we feel justified in calling to the attention of the Court, and that is, that the bill alleges that after a delay of 13 years, the heirs of Tucker make claim to this property, not by the institution of a suit in their own behalf and in their own names, but by the execution of certain instruments which are in the bill called "good and sufficient deeds." There is absolutely no allegation that the said deeds were based upon a consideration of any kind or description whatsoever, and while it may be said that an allegation as to the consideration which was paid for the deeds was not necessary for the purpose of showing that the right, title and interest of the heirs had vested in Cornell under said deeds, still it is submitted that when the complainant in this case makes an appeal to the equitable powers of this

Court, he must make such allegations as will, under the particular circumstances of the case, show that he is entitled to the consideration of a court of equity. It is a legitimate suggestion to ask what motive could prompt Cornell to purchase from the heirs of Tucker a pretended claim to this property which had not been asserted for 13 years, and it seems that a court of equity ought to require that under these circumstances when an appeal is made to it for equitable relief, the complainant should make some allegation of his good faith in the premises, and it should also be required that he should show what, if any consideration, he had paid for the claim. In the absence of any allegations in the bill on that subject the Court would be justified, under the circumstances of this case, to presume that the facts did not justify the allegations that the complainant had acted in good faith, or that he had paid any valuable consideration for the property. It does, however, affirmatively appear from the record that these "good and sufficient deeds" from the heirs of Tucker were made in the months of January, February and March, 1890. and that, whatever might have been the delay in asserting this claim prior to the execution of these deeds, there was no delay in bringing the suit after the deeds were executed, and it is in view of the circumstances in this case and of the allegations contained in the complainant's bill, fair to presume that these deeds were made in contemplation of and for the purpose of enabling the complainant to bring this suit, and inasmuch as they were made at the very time that the World's Fair was about to be inaugurated, it is also fair to presume that it was intended by the par-

ties to these "good and sufficient deeds" that the complainant should thereby be enabled to speculate upon the increase in the value of this property in the past and the probable rapid increase in the near future.

It is respectfully submitted that under the facts and circumstances of this case, and under the allegations in the bill, it is legitimate to assume that such was in fact the nature of the transaction between the heirs of Tucker and the complainant John Evans Cornell. It is also suggested that it is not the disposition of a court of equity to lend its aid in carrying out such a speculation after the lapse of time which has intervened in this case, and it is respectfully submitted that such a transaction is subject to the denunciation found in Pomeroy's Equity Jurisprudence, page 1276, as follows:

"Also an assignment which violates the policy of the "law against champerty or maintainance, as operating "merely to procure or promote litigation, will not be per- "mitted by a court of equity even though it may not "amount strictly to the criminal offense of champerty or "maintainance. For this reason the assignment of a "mere right of action to procure a transaction to be set "aside on the ground of fraud, is not permitted."

CHARLES W. OGDEN,
Of Counsel for Appellee.

Office Supreme Court, U. S.
FILED.
MAR 20 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 160.

JOHN EVANS CORNELL, APPELLANT,

vs.

HETTIE H. R. GREEN.

Memorandum of Additional Authorities on Behalf of Appellee.

In reply to the contention upon the part of the appellant that Tucker was not a party to or bound by the decree and sale in the case of Green *vs.* Gage because of an alleged defect in the prayer for process, we reply that it is by no means clear that, in considering all of the allegations of the bill together, the prayer for process would not have been held sufficient on demurrer, but even though it would have been held insufficient on demurrer, it is very clear the defect was at most an irregularity which could only have been

taken by demurrer, and cannot be urged now to avoid the decree and sale.

Howe *vs.* Robins *et al.*, 36 N. J. Eq., 19, and note.
1st Beach Modern Equity Practice, p. 95, and cases cited in note.

Upon the jurisdictional questions we beg to cite the following cases which were used on the argument and were noted in copy of appellee's brief and argument handed opposing counsel:

Borgmeyer *vs.* Idler *et al.*, 159 U. S., 408.
Ansbro *vs.* United States, 159 U. S., 695.

Respectfully submitted.

CHARLES W. OGDEN,
Of Counsel for Appellee.

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FILED.
MAR 27 1896
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

JOHN EVANS CORNELL,
Appellant,
vs.
HETTIE H. R. GREEN,
Appellee.

Case No. 15,141.

Term No. 160.

Citation of cases by Appellant in Reply to Appellee's citation, not contained in her brief, &c., and since filed by her, a copy of which we received from the Clerk of the Supreme Court to-day.

Appellant begs leave to file the following citations in reply to appellee's brief, which was filed the day after the argument commenced, on the question of removal by reason that the facts averred sufficiently showed that a constitutional question, or right, was involved as well as the right to remove on the ground of diversity of citizenship. In the case of *Little York Gold Washing, &c. Co.* v. *Keyes*, (96 U. S., 199), a case in point, Mr. Chief Justice WAITE says: "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises. * * *

"In pleading the statute (of the United States) there-
,, fore, the facts must be stated which call it into opera-
" tion. The averment that it is in operation will not be
" enough; for that is the precise question the court is
" called upon to determine.

" Before, therefore, a Circuit court can be required to
" retain a cause under this jurisdiction, (*i. e.*, that a
" constitutional right is relied on, or a United States stat-
" ute is drawn in question), it must in some form appear
" upon the record, by a statement of facts, ' in legal and
" logical form,' such as is required in good pleading, (1
" Chit. Pl., 213), that the suit is one which ' really and
" substantially involves a dispute or controversy ' as to a
" right which depends upon the construction or effect
" of the constitution, or some law or treaty of the United
" States."

Osborne v. *Bank*, 9th Wheat., 822, is to the same effect.

If the omission to directly aver the conclusion of law that the case is one involving a construction of the constitution, the Supreme court may pass upon the merits and allow an amendment, if the case is to be remanded, the probabilities being, that from the averment of facts the pleader inadvertently neglected to plead such a conclusion of law, if such is necessary.

Grace v. *The Insurance Co.*, 109 U. S., 285.

Howe v. *Robbins et al.*, 36 N. J. Eq., 19, quoted by appellee, is explained later in *White* v. *Davis*, 48 N. J. Eq., 19 and 22, and is in accord with the rules of this court.

Green v. *Gage*, was not brought in the state courts of New Jersey, but in Illinois.

The case was brought in the Federal court, and the rules of the Supreme court in equity apply. The twenty-third rule is also in accord with the chancery practice of Illinois. (Peterbaugh Pld. & Prac., 60.)

Not to make a party defendant in the pra yer for process or to summons him as such, is jurisdictional, and not a mere irregularity.

Had Tucker appeared and demurred, *then* an amendment would have been allowed, but without such appearance the decree against "defendants" is void as to one not a defendant.

It is unnecessary to remind this court that all provisions of the constitution which are protective of the *primary* rights of citizens must be construed liberally and not *stricti juris*.

Respectfully submitted.

ROBERT RAE,
For Appellant.

LYMAN TRUMBULL,

F. B. DYCHE,
Solrs. for Appellant.